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Question 1.

Under the Alaska Workmen's Compensation Act (Appendix p. 1; particularly, Sec. 43-3-14, ACLA 1949, Appendix p. 29), can the Alaska Industrial Board disregard the general principle that every human assertion, offered testimonially, i.e.: as evidence of the truth of facts asserted (here to prove or disprove a claim for compensation under that Act), shall be subjected to the two tests, viz.: the asserter must (a) be subjected to cross-examination by the opponent and (b) be confronted with the opponent and the trial tribunal (here, Alaska Industrial Board) [Wigmore's Code of Evidence, Rules 148, 149]? or, can that Board base its findings, decision and award under that Act upon ex parte, hearsay, unverified or other incompetent evidence in defiance of the hearsay and other established rules of evidence? 15

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Does the Alaska Workmen's Compensation Act (Appendix p. 1) empower the Alaska Industrial Board to award wage compensation, without limit either as to amount or as to the period over which payable, by awarding to an employee, for one and the same injury, arising out of the same accident, not only temporary disability compensation but also permanent, either partial or total, disability compensation? 22

Question 3.

Do the Alaska Statutes empower the District Court of Alaska to allow an attorney fee as costs against the losing litigant, either employer or employee, on a review before it on appeal from the Alaska Industrial Board's findings, decision, and award of a claim for wage compensation under the Alaska Workmen's Compensation Act (Appendix p. 1)? 39

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

No. .....

LIBBY, MCNEILL & LIBBY (a corporation),
Petitioner,

vs.

ALASKA INDUSTRIAL BOARD, Composed of the Territorial Insurance Commissioner, Attorney General for Alaska and the Territorial Commissioner of Labor, and PETER LATHOURAKIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Libby, McNeill & Libby, a corporation, that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit, respectfully shows:

OPINIONS.

U. S. Court of Appeals for the Ninth Circuit, August 10, 1951, unreported. (R. 142.)

District Court for the Territory of Alaska, First Division. (R. 119.)

Alaska Industrial Board award, September 28, 1949. (R. 13-18.)

MATTER INVOLVED.

The hearing on the claim of Peter Lathourakis for compensation under the Alaska Workmen's Compensation Act (Sections 43-3-1 to 43-3-41, ACLA 1949 [Appendix p. 1]) was held before the full Alaska Industrial Board, whose award (R. 13-18), which was based upon ex parte, unverified, hearsay and incompetent evidence (R. 37, 112, 116), allowed, for one and the same injury, arising out of the same accident, both temporary disability compensation of $3833.55 and permanent 50% disability compensation of $3600.00. (R. 17.)

Petitioner Libby, McNeill & Libby appealed to the District Court of the Territory of Alaska (R. 3), which sustained the Board's award, other than it reduced the total temporary disability compensation to $3055.00 ($2005.00 + $1050.00) (R. 125), but also allowed Lathourakis as costs an attorney fee of $350.00 for his attorney's services in the District Court. (R. 125.)

Petitioner Libby, McNeill & Libby appealed to the United States Court of Appeals for the Ninth Circuit (R. 126) on three points: 1, the Alaska Workmen's Compensation Act does not authorize the Alaska Industrial Board to base its Findings, Decision and Award upon ex parte, hearsay, unverified or other incompetent evidence; 2, that Act does not empower that Board to award to an injured employee for one and the same injury not only temporary disability compensation but also permanent, either partial or total, disability compensation; and, 3, the District Court was without jurisdiction to allow and assess an attorney fee of $350 to Lathourakis for services of his attorney in the proceedings before that Court. (R. 130-132.)

The appeal was argued December 11, 1950. The District Court's judgment was sustained August 10, 1951, Opinion (R. 142) not yet reported.

A rehearing was denied September 17, 1951. (R. 148.) Stay until November 12, 1951, extended to November 30, 1951, was granted September 21, 1951.

STATEMENT OF JURISDICTION.

Section 1254, Title 28, USCA, June 25, 1948, c. 646, 62 Stat. 928, provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."
>
> "* * * * * * * *."

Section 1291, Title 28, USCA, June 25, 1948, c. 646, 62 Stat. 929, provides:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

This case does not involve a decision invalidating an Act of Congress, nor any order by a three judge Court; hence, no direct appeal could have been taken under either Section 1252 or Section 1253, Title 28, USCA, June 25, 1948, c. 646, 62 Stat. 926.

Section 1248, Title 28 USCA, June 25, 1948, c. 646, 62 Stat. 630, provides, inter alia:

> "Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeal as follows:
>
> "* * * * * * * *."

"(2) From the District Court for the Territory of Alaska or any division thereof, to the Court of Appeals for the Ninth Circuit.

"* * * * * * * *."

Section 43-3-25, ACLA 1949, Alaska Workmen's Compensation Act provides:

"Jurisdiction of Court. No court of this Territory, except the United States District Court on review, or the United States Circuit Court of Appeals on appeal, shall have jurisdiction to review, vacate, set aside, reverse, correct, amend or annul any order or award of the Industrial Board or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Industrial Board in the performance of its duties."

Section 43-3-22, ACLA 1949, Alaska Workmen's Compensation Act, provides, inter alia:

"An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within thirty days from the date of such award, if the award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the District in which the injury occurred. * * *."

The award was by the full Board and was rendered on September 28, 1949. (R. 13-18.)

The complaint and appeal was filed within 30 days, i.e.: on October 27, 1949 (R. 18), in the District Court for the Territory of Alaska of the Third Judicial Division, wherein the injury occurred. (Complaint and Appeal, Paragraph X, undenied, R. 7.)

The proceedings were brought against the Alaska Industrial Board. (R. 3, 4, 19.)

The employee Lathourakis, under stipulation by the employer and the Board, voluntarily appeared by counsel and filed his answer to the complaint. (R. 19.)

QUESTIONS PRESENTED.

1. Under the Alaska Workmen's Compensation Act (Appendix p. 1; particularly, Sec. 43-3-14, ACLA 1949, Appendix p. 29), can the Alaska Industrial Board disregard the general principle that every human assertion, offered testimonially, i.e.: as evidence of the truth of facts asserted (here, to prove or disprove a claim for compensation under that Act), shall be subjected to the two tests, viz.: the asserter must (a) be subjected to cross-examination by the opponent and (b) be confronted with the opponent and the trial tribunal (here, Alaska Industrial Board) [Wigmore's Code of Evidence, Rules 149, 148]? Or, can that Board base its findings, decisions and award under that Act upon ex parte, hearsay, unverified, or other incompetent evidence in defiance of the hearsay and other established rules of evidence?

2. Does the Alaska Workmen's Compensation Act (Appendix p. 1) empower the Alaska Industrial Board to award wage compensation, without limit either as to amount or as to the period over which payable, by awarding to an employee, for one and the same injury, arising out of the same accident, not only temporary disability compensation but also permanent, either partial or total, disability compensation?

3. Do the Alaska statutes empower the District Court of Alaska to allow an attorney fee as costs against the losing litigant, either employee or employer, on a review before it on appeal from the Alaska Industrial Board's Findings, Decision, and Award of a claim for wage compensation under the Alaska Workmen's Compensation Act (Appendix p. 1)?

REASONS RELIED ON FOR THE ISSUANCE OF WRIT.

The first question has never been answered to petitioner's knowledge in Alaska or for that matter in the Ninth Circuit.

An affirmative answer is contrary to the weight of judicial opinion (Wigmore on Evidence, Volume 1, p. 83, 3rd ed.) in construing statutory provisions even of broader scope than the Alaskan statute, viz.: "Process and procedure under this Act shall be as summary and simple as reasonably may be," (Sec. 43-3-14, ACLA 1949, Appendix p. 29), notwithstanding the learned Appellate Court's decision, viz.: "In this situation Landro's physicians' letters merely

'supplement' and 'explain' the testimony. The Alaska rule is not novel but in line with general practice in such cases. Cf. Wigmore on Evidence, Vol. 1, pp. 38, 79, 83" (Landro unreported opinion p. 3, Landro R. 99), which was followed in this case, viz.: "As in the Landro case, the letters of the employee's physicians did not more than supplement the above testimony." (Lathourakis unreported opinion p. 3, R. 144.)

Petitioner does not concede any such rule exists in Alaska, or that Wigmore's suggested rule is either sound or in accord with the general practice in such cases; in fact, petitioner hopes to show that Professor Wigmore himself either did not believe in it or else it is inconsistent with other rules announced by him. (Cf. Brief, pp. 20, 21, infra.)

Petitioner also hopes to convince this Court that the use of ex parte, unverified, hearsay, or other incompetent evidence to "supplement" or "explain" competent evidence doesn't convert a sow's ear into a silk purse. (Cf. Brief, pp. 17, 18.)

An affirmative answer to the first question will be a damaging disservice not only to the worker and his employer but also to the general public of Alaska.

In fact, an affirmative answer to the first question well ought to be resisted by the general public of the entire area embraced within the Ninth Circuit, in the fear it might lead to the maladministration of justice.

If the decision of the Court of Appeals stands, it will become the law in Alaska. If so scanty legislative language as "Process and procedure under this Act

shall be as summary and simple as reasonably may be" (Sec. 43-3-14, ACLA 1949, Appendix p. 29), constitutes a new exception to the hearsay rule, soon it will be cited in Alaska to support other encroachments upon the hearsay rule.

Once established, the decision, emanating from so eminent a Court, will in all likelihood be used at least persuasively, if not authoritatively, throughout the Ninth Circuit, in numerous board and commission hearings and eventually in Courts of justice, both Federal and State, to break down the wall that the hearsay rule has so long maintained against the forces of dishonesty, perjury, fraud, and unreliability.

An affirmative answer to the second question is doubtless of no moment to the general public of the Ninth Circuit, but it may well lead to serious economic injury in Alaska to the detriment of every employee and of every employer.

It, too, to petitioner's knowledge, has never been previously answered.

It will militate against the employee of the dishonest or unprincipled employer who, to save money, may well profit by establishing by whatever means possible the early fixation of the employee's injury into some degree of permanent disability so as to avoid paying temporary disability compensation for the period properly required by the employee to convalesce from his injury. It is much cheaper to pay 10% of $7200 as permanent 10% disability compensation than to pay 65% average monthly wages of $400 for even six months.

An affirmative answer to the second question will militate against the employer of the malingering employee who would well profit by establishing by whatever means possible that his "compensation" back had not yet become fixed into permanency, either partial or total, and thereby receive indefinitely even for life, temporary disability compensation.

It will make every employer, small or big, whether lawyer, doctor, merchant, miner, canner, carpenter, builder, or of "any business, occupation, work, employment, or industry", except domestic service, agriculture, dairying, or railroad common carriers, who employs three or more persons (Sec. 43-3-1, ACLA 1949, Appendix p. 2), the possible insurer for life of every employee, young or old, who is so unfortunate as to be injured or suffer an occupational disease arising out of and in the course of his employment.

The potential cost is staggering. It can lead to destroying the very purpose of Workmen's Compensation Acts, i.e.: to make certain the amount the employer shall pay and the employee shall receive and to obviate litigation's delays and costliness and antagonisms between employers and employees, and resultant hardships, by making the risk so high, or if risk be accepted, the cost of an accident, without the employer's fault, so great that no business, occupation, work, employment, or industry can afford to employ three or more persons at one time; and by encouraging employee and employer alike, the former to seek excessive compensation, the latter to avoid paying due compensation.

It disregards entirely the purposes of the Act, and the express legislative limitations of the Act. (Cf. Brief pp. 28, 32, 38, infra.)

No previous judicial answer to the third question has been reported to petitioner's knowledge.

An affirmative answer to it means that the Alaska worker, who appeals to the District Court from an adverse award by the Alaska Industrial Board upon his claim for compensation under the Alaska Workmen's Compensation Act (Appendix p. 38), may be assessed, if the award be sustained by the District Court, the fee for the services of his employer's attorney in opposing that appeal in the District Court.

It is difficult to believe that the Territorial Legislature, without specific language, intended that any Alaskan employee might be subject to such cost, in seeking the benefits conferred upon him by that Act, in which the legislature was so solicitous of the employee as to prohibit the employee from contracting with a lawyer as to the latter's fee for services in prosecuting the employee's claim before the Alaska Industrial Board, but reserved to the Board the authority to fix that fee. (Sec. 43-3-23, ACLA 1949, Appendix p. 39.)

In this action the District Court charged to the employer the employee's attorney's fee for services on the appeal in that Court. But, inasmuch as no statute says such fee shall be charged against the unsuccessful employer only, or that the employee only shall be the beneficiary of such a cost allowance, had

Lathourakis been unsuccessful in the District Court the latter could have just as logically charged the employer's attorney's fee against him.

The $350 attorney fee allowed as costs by the District Court in the proceeding before it (R. 125) must be distinguished from the $1100 fee allowed Lathourakis' attorney by the Board (R. 18), which is payable out of the award itself. (Sec. 43-3-23, Appendix p. 39.)

Petitioner contends in Alaska an attorney fee cannot be allowed as costs except when authorized by statute, and that there is no applicable statute, or by agreement.

Wherefore, petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit and that said judgment be reversed and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

Dated, at Juneau, Alaska,
November 9, 1951.

LIBBY, MCNEILL & LIBBY (a corporation),
Petitioner,

By R. E. ROBERTSON,

BOGLE, BOGLE & GATES,
Counsel for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

No. .....

LIBBY, McNEILL & LIBBY (a corporation),
Petitioner,

vs.

ALASKA INDUSTRIAL BOARD, Composed of the Territorial Insurance Commissioner, Attorney General for Alaska and the Territorial Commissioner of Labor, and PETER LATHOURAKIS,
Respondents.

BRIEF IN SUPPORT OF PETITION.

JURISDICTION.

The jurisdictional statutes have been stated at pp. 4, 5, 6, supra, in the petition.

STATEMENT OF THE CASE.

A sufficient statement of the case is believed to have been given in the petition, pp. 2, 3, supra.

SPECIFICATIONS OF ERROR.

The United States Court of Appeals for the Ninth Circuit erred:

1. In affirmatively answering Question 1 (p. 6, supra), and in holding that the Alaska Industrial Board could base its findings, decision, and award upon ex parte, unverified, hearsay and incompetent evidence, and that that kind of evidence had probative force to supplement or explain competent evidence.

2. In affirmatively answering Question 2 (p. 7, supra), and in holding that under the Alaska Workmen's Compensation Act (Appendix p. 1) temporary disability compensation and partial permanent disability compensation are both payable for one and the same injury, arising out of the same accident.

3. In affirmatively answering Question 3 (p. 7, supra), and in holding that the District Court for the Territory of Alaska has jurisdiction to allow an attorney fee as costs for attorneys' services in that Court upon the review therein of an appeal thereto from findings, decision, and award of the Alaska Industrial Board upon a claim under the Alaska Workmen's Compensation Act.

ARGUMENT.

QUESTION 1.

UNDER THE ALASKA WORKMEN'S COMPENSATION ACT (APPENDIX p. 1; PARTICULARLY, SEC. 43-3-14, ALCA 1949, APPENDIX p. 29), CAN THE ALASKA INDUSTRIAL BOARD DISREGARD THE GENERAL PRINCIPLE THAT EVERY HUMAN ASSERTION, OFFERED TESTIMONIALLY, I.E.: AS EVIDENCE OF THE TRUTH OF FACTS ASSERTED (HERE, TO PROVE OR DISPROVE A CLAIM FOR COMPENSATION UNDER THAT ACT), SHALL BE SUBJECTED TO THE TWO TESTS, VIZ.: THE ASSERTER MUST (a) BE SUBJECTED TO CROSS-EXAMINATION BY THE OPPONENT AND (b) BE CONFRONTED WITH THE OPPONENT AND THE TRIAL TRIBUNAL (HERE, ALASKA INDUSTRIAL BOARD) [WIGMORE'S CODE OF EVIDENCE, RULES 148, 149]? OR, CAN THAT BOARD BASE ITS FINDINGS, DECISION AND AWARD UNDER THAT ACT UPON EX PARTE, HEARSAY, UNVERIFIED OR OTHER INCOMPETENT EVIDENCE IN DEFIANCE OF THE HEARSAY AND OTHER ESTABLISHED RULES OF EVIDENCE?

The learned Court of Appeals conceded that the Board's award was based, at least to some extent, upon ex parte, unverified, hearsay evidence (Physicians' letters, R. 37, 112, 116), because it said: "As in the Landro case, the letters of the employee's physicians did no more than supplement the above testimony." (R. 144.) In the Landro opinion it said: "In this situation Landro's physicians' letters merely 'supplement' and 'explain' the testimony. The Alaska rule is not novel but in line with general practice in such cases. Cf. Wigmore on Evidence, Vol. 1, pp. 38, 79, 83." (Landro case, R. 99.)

Petitioner formally objected in its Answer (R. 12) to Application to Adjust Claim (R. 8-10), which Answer was filed May 26, 1949 (not denied Par. VI, R.

5) and in its written Objections (R. 20-21), served June 27, 1949 (R. 21), both more than two months prior to the Board's hearing on the claim on August 30, 1949 (not denied Par. VII, R. 5); hence, both the Board and Lathourakis had ample opportunity to have obtained and presented competent evidence at the hearing.

"Supplement" as a transitive verb means: "To fill up or supply by additions; to add something to; to fill the deficiencies of; as, to supplement a work by an index; to supplement meager meals by fruit." Webster's New International Dictionary, 2d Ed.

"Explain" means: "To make plain, manifest, or intelligible; to clear of obscurity; to expound; as, to explain a chapter of the Bible." ibid.

This incompetent evidence having been admitted over objection is not to be considered or given any probative force even under the rule announced in *Diaz v. U. S.*, 223 U.S. 442, 56 L.ed. 500, 503.

Petitioner has found no decisions by this Court that inadmissible evidence may be used to "supplement", i.e.: "to fill up or supply by additions; to add something to; to fill the deficiencies of" other evidence, or to "explain", i.e.: "to make plain, manifest, or intelligible other evidence, or to clear it of obscurity"; in fact, petitioner submits inadmissible evidence has no probative force whatever under the New York, Georgia, Texas, and Maine rule.

104 *ALR* pp. 1134, 1135.

Necessarily these inadmissible letters (R. 37, 112, 116) were given probative force when used to "supplement" and "explain" Doctor Gray's competent testimony (R. 83-110); but, actually used, in conjunction with Lathourakis' testimony (R. 144), to refute the uncontradicted, competent evidence of both Doctor Gray (R. 86-91; 91-92; 103) and Doctor McGowan (R. 55-58-61-70-79-80), that Lathourakis' condition was due to the operation not to the claimed injury.

This inadmissible evidence was also used to contradict Doctor Gray's competent evidence that Lathourakis' condition, resulting from his injury, reached its permanency fix on October 1, 1948 (R. 92) instead of on May 20, 1949, of which there was no competent evidence, as found by the Board. (R. 16.)

Nor does the rule prevail in Alaska that ex parte, unverified, hearsay or other incompetent evidence may be considered and given probative force to prove or disprove a claim under the Alaska Workmen's Compensation Act.

Chief Justice Marshall's admonition still sounds the alarm against its adoption, viz.:

> "The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule, the value of which is felt and acknowledged by all."
>
> *Queen v. Hepburn,* 11 U.S. 290, 295;
>
> *Hopt v. People of Utah,* 110 U.S. 574, 28 L.ed. 262, 266;

Donnelly v. U. S., 228 U.S. 243, 276;
Interstate Commerce Com. v. Louisville & N. R. Co., 227 U.S. 88, 93, 57 L.ed. 431, 434;
Bridges v. Wixon, 326 U.S. 135.

Nor was the hearsay rule departed from, as petitioner understands, except because of an exception that the Articles of War did not prohibit the departure in

In re Yamashita, 327 U.S. 1, 18.

The Court of Appeals for the Ninth Circuit conceded that hearsay to be admissible must come within some exception, in

Meyers v. U. S., 147 F2d 663, 666.

Brewster v. Villa, 90 F2d 853, 855 (5 CCA);
Hanfelt v. U. S., 53 F2d 811, 813 (8 CCA);
Halleck v. Hartford A. & I. Co., 75 F2d 75, 80 (5 CCA).

The hearsay rule, petitioner submits, is clearly established by the many decisions of this Court to be a law, even if unwritten, of the United States; hence, the Territorial Legislature would have no power, even if it wished, to depart from the rule in view of the provisions of the Organic Act, viz.:

> "That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; * * *."
>
> Section 3, Organic Act, Aug. 24, 1912.

> "The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, * * *." Sec. 9, id.
>
> Aug. 24, 1912, c. 387, Pars. 3 and 9, 37 Stat. 512.

But, the Territorial Legislature did not depart from the rule.

The Alaska Act contains no provisions similar to that in the Longshoremen's and Harbor Workers' Act, i.e.: "In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence * * *." Title 33, USCA, Sec. 923 (a).

The only pertinent provisions in the Alaska Act are:

> "The Industrial Board may make rules not inconsistent with this Act for carrying out the provisions thereof. Process and procedure under this Act shall be as summary and simple as reasonably may be. * * *" (Sec. 43-3-14, Appendix p. 29.)
>
> "* * * The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner. * * *" (Sec. 43-3-15, Appendix p. 30.)

Those provisions do not authorize a departure from, or create an exception to, the hearsay rule. Under the California statute, that the Industrial Accident Commission should not be bound "by the technical rules

of evidence", the California Courts held that the Commission had no power to make an award where the only evidence was hearsay testimony.

Englebretson v. Ind. Acc. Com., 151 P. 421, 422, 423,

citing:

Queen v. Hepburn, 11 U.S. 290, 295, supra.

Subsequently hearsay became admissible in California workmen's compensation cases, but, according to Judge Wilbur, because the California statute expressly permitted it, which statute did not violate the California Constitution.

Employer &c. Corp. v. Ind. Acc. Com., 177 P. (Cal.) 273, 277;

Western Indemnity Co. v. Ind. Acc. Com., 163 P. (Cal.) 60.

Petitioner submits that the Wigmore theoretical rule of admission of hearsay in such cases (Wigmore on Evidence, Vol. 1, 3rd Ed., p. 83) is not supported by the majority of decisions, except under specific statute, such as the 1915 California statute, and is contrary to his own other announced rules, viz.:

> Rule 147. General Principle. "Every human assertion, offered testimonially (Rule 28, Art. 1, ante, Sec. 201), i.e. as evidence of the truth of the fact asserted, must be subjected to two tests:—(W. Sec. 1362)
>
> (1) The person making the assertion must be subjected to cross-examination by the opponent, i.e.: must make it under such circumstances that the opponent has an adequate opportunity, if de-

sired, to test the truth of the assertion by questions which the person is compellable to answer;

(2) The person making the assertion must be confronted with the opponent and the tribunal, i.e.: must be in their presence when making the assertion and giving his answers."

Rule 148. General Principle. "Every testimonial assertion must be so presented that the opposing party has an opportunity to test its credit by cross-examination of the person making the assertion."

Rule 149. General Principle. "Every testimonial assertion must be made in the presence of the tribunal and the opponent,

(1) primarily in order that the opponent may exercise his opportunity to cross-examine (Rule 148), and

(2) secondarily, in order that the tribunal may be enabled to observe the personality and the demeanor of the witness, while testifying, for the purpose of assisting in determining the credit to be given to his testimony. (W. Sec. 1395)"

Rule 173. General Principle. "Every person giving testimony in court or by deposition must publicly make oath or affirmation that he will in that testimony speak the truth.—(W. Sec. 1824)"

Wigmore's Code of Evidence, Rules 147, 148, 149, and 173.

Similar ex parte letters of physicians were held not to constitute substantial evidence under the Long-

shoremen's and Harbor Workers' Act, and the right of cross-examination maintained in

Southern Stevedoring Co. v. Voris, 190 F2d 275, 277, 278 (5 CCA).

QUESTION 2.

DOES THE ALASKA WORKMEN'S COMPENSATION ACT (APPENDIX p. 1) EMPOWER THE ALASKA INDUSTRIAL BOARD TO AWARD WAGE COMPENSATION, WITHOUT LIMIT EITHER AS TO AMOUNT OR AS TO THE PERIOD OVER WHICH PAYABLE, BY AWARDING TO AN EMPLOYEE, FOR ONE AND THE SAME INJURY, ARISING OUT OF THE SAME ACCIDENT, NOT ONLY TEMPORARY DISABILITY COMPENSATION BUT ALSO PERMANENT, EITHER PARTIAL OR TOTAL, DISABILITY COMPENSATION?

The learned Appellate Court placed its decision, that the injured employee is entitled to both total temporary disability compensation and permanent, either partial or total, disability compensation for one and the same injury arising out of the same accident, squarely upon this Court's construction of the Longshoremen's and Harbor Workers' Act in *Baltimore & Philadelphia Steamboat Co. v. Norton,* 284 U.S. 408, 414. (R. 146.)

This is evidenced by the Appellate Court also citing its own previous decision in *Contractors v. Pillsbury, Commissioner,* 150 F2d 310, 313, which, in also construing that Act, followed this Court's decision in *Steamboat Co. v. Norton, supra,* and also *Thoresen v. Schmahl,* 24 N.W. 2d 273, 276, which is based upon

a Minnesota statute providing for additional compensation to be paid injured employees who had been or were being paid compensation under a previous law at the time of the passage of the later statute, and also *Wilkins v. Blanchard-McDonald Lumber Co.*, 52 A2d 781, which seemingly is based upon the Vermont statute, i.e.: "By P.L. 6527 the payment of specific benefits for permanent partial disability shall be made 'at the termination of the total disability'." (ibid, p. 783.)

Without conceding that *Steamboat Co. v. Norton,* supra, justifies the Appellate Court's decision here, petitioner urges that the Minnesota and Vermont decisions give no support to it whatever; in fact, they clearly show that the specific statute involved necessarily must always control; hence, that the language of the Alaska Workmen's Compensation Act (Appendix p. 1, supra), not that the Longshoremen's & Harbor Workers' Act, must be construed in this case.

Vital distinctions exist, petitioner believes, between the Alaska Workmen's Compensation Act and the Longshoremen's & Harbor Workers' Act.

Section 14 (m) [Title 33 USCA 914 (m)] of the latter Act limits the total compensation payable for injuries at $11,000, except that limitation does not apply to permanent total disability or death, and total compensation of $10,000 for disability sustained under Section 8 (21) (c) and any temporary, total or partial, disability sustained in addition thereto (Title 33 USCA 908).

These limitations and exceptions, as petitioner understands, were created by the amendatory Act of June 24, 1948, c. 623, Par. 5, 62 Stat. 603. U. S. Congressional Service, 80th Congress, Second Session, Volume 1, p. 618; Volume 2, p. 1981.

Compensation for death is not involved here, nor are the statutory provisions for death compensation material because they govern a beneficiary's claim for the death of another, which distinctly differs from an employee's claim for his own compensation.

The Alaska Act has no such provision as Section 908(c) (22) [Title 33 USCA 908 (c)]; nor, in fact, does it distinguish between temporary total and temporary partial disability.

Temporary disability compensation is based upon 65% of daily average wages (Section 43-3-1, Appendix 10, 11), payable periodically and in like manner as wages (Section 43-3-3, Appendix p. 16), commencing on the second day after the injury if it incapacitates the employee from earning full wages for a period of at least one day in addition to the day on which the injury occurred. (Section 43-3-8, Appendix p. 21.)

Nor does the Alaska Act contain provisions analogous to Section 908(c) and its complementary subdivisions (b) and (e) [Section 908(c) and (b) and (e), Title 33 USCA].

The Alaska Act does provide lump sum payments for death. (Section 43-3-1, Appendix pp. 2-5.)

And lump sum payments for total and permanent disability. (Section 43-3-1, Appendix pp. 6-7.)

And lump sum payments for partial permanent disability (Section 43-3-1, Appendix pp. 8-10), arising out of loss of one or more members, including head, neck, facial, or other disfigurement; but, loss of both hands, both arms, both feet, both legs, both eyes, or any two thereof, or hearing in both ears constitutes total, permanent disability and is compensable as such. (Section 43-3-1, Appendix pp. 11-12.)

Lump sum compensation, computed upon the ratio of loss of earning capacity, is payable for other partial disabilities which are permanent in character but do not come wholly within one of the specific cases of partial permanent disability. (Section 43-3-1, Appendix p. 12.)

The Alaska Industrial Board may direct compensation, other than for temporary disability, paid biweekly, monthly, or otherwise (Section 43-3-1, Appendix p. 17), seemingly despite the foregoing provisions for lump sum payments; but, this provision has not to petitioner's knowledge ever been judicially construed, or put into actual effect by the Board.

Compensation, by way of medical, surgical, hospital, and prosthetic service, is also payable for not exceeding one year from and after the date of injury. (Section 43-3-2, Appendix p. 15.)

The Act specifically limits total compensation for partial permanent disability to $7200.00 (Sec. 43-3-1,

Appendix p. 12) and for total permanent disability to $9000.00 (Sec. 43-3-1, Appendix p. 7).

Petitioner submits that temporary disability compensation is payable for not to exceed one year from and after the date of the injury, i.e.: for the year during which the employer must furnish medical, surgical, prosthetic, and hospital service (Sec. 43-3-2, Appendix p. 15), during which period the Act assumes the employee may need such service pending his recovery from the injury or its fixation into some degree of permanency; and, that temporary disability compensation, which is, as seen, payable regardless of totality or partiality so long as the injury prevents the employee from earning full wages for at least one day in addition to the day on which the injury occurred (Sec. 43-3-8, Appendix p. 21), is limited in money by the $7200.00 total compensation for partial permanent disability, or at least by the $9000.00 total compensation payable for total permanent disability (also the death benefit limit [Sec. 43-3-1, Appendix p. 7]), because it would be illogical to pay for a lesser disability a greater compensation than is payable for a greater disability.

Furthermore, the Board's award of an increased rate of compensation is "subject to the maximum or minimum provided in this schedule." (Sec. 43-3-4, Appendix p. 18.) Hence, in any event, compensation for temporary disability is limited to $9000.00, the highest amount payable under the Act.

Petitioner submits that the rule announced by the Massachusetts Court applies:

> "All compensation acts rest upon the policy that the industry should bear the burden of industrial accidents, but there is no policy that justifies placing the burden upon the employer twice, especially where that results in paying the employee so much that it becomes to his advantage to remain away from work."
>
> *Mizrahi's* case, 71 N.E. 2d 383, 385.

Lathourakis worked at his occupation of fisherman in 1949 (the season the year after his injury) and earned $1528.67. (R. 111.)

Both temporary disability compensation and partial permanent disability (other than for loss of members) compensation are based upon loss of earning capacity; the former being computed at 65% of average daily wages, or a 35% loss; the latter, at the ratio of percentage of total permanent disability.

Judge Pound's decision in ***Markhoffer v. Markhoffer,*** 116 N.E. 379, 380, speaks persuasively that double compensation is not payable under the Alaska Act, for one and the same injury arising out of the same accident.

Inasmuch as the multitude of divergent decisions clearly disclose that the construction of the Alaska Workmen's Compensation Act must be based upon its own language, it is advisable to note that the present 1946 act amended the previous acts.

The Act provides:

"And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, *relating to cases other than temporary disability,* the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provisions in this schedule." (Italics supplied.)

Section 43-3-1, Appendix p. 11.

This provision in the 1915, 1923, 1927, and 1929 Acts reads:

"And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, *and the employee has been paid compensation for temporary disability,* the amount so paid him shall be *deducted from* the amount to which he shall be entitled under such provision in this schedule." (Italics supplied.)

Sec. 1, p. 151, Ch. 71 ASL 1915;
Sec. 1, p. 241, Ch. 98 ASL 1923;
Sec. 1, p. 154, Ch. 77, ASL 1927;
Sec. 1, p. 152, Ch. 25, ASL 1929.

Thus, the words "in addition to", instead of the words "deducted from", were first used by, and the clause "and the employee has been paid compensation for temporary disability" was first omitted from the present or 1946 Act.

See Section 1, Appendix p. 11.

Had the legislature intended that "temporary disability compensation", already paid, should not be deducted from such partial or total disability compensation as was later paid or payable to the injured employee, then it would simply have changed the words "deducted from" to "in addition to".

But, that was not the legislature's intent; hence, it also by the 1946 Act struck out and eliminated the words "and the employee has been paid compensation for temporary disability," so as to clearly indicate that the words "the amount so paid him" did not mean such sum as had been paid the employee as "compensation for temporary disability"; otherwise, there was no sense in changing the clear statute, into ambiguity, because had the words "and the employee has been paid compensation for temporary disability" been retained in the statute, then the words "the amount so paid him" probably could have been held to refer back to the opening sentence in this same paragraph, i.e.: "for all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, 65 percent of his daily wages."

The juxtaposition of the last quoted sentence to the other language in this particular subparagraph of Section 1 of the Act, which was so amended by the 1946 Act, is without significance in view of the awkward intermingling of different subparagraphs, subsections and provisions throughout Section 1 of the Act without regard to continuity or logical sequence

or antecedence of similar or dissimilar provisions thereof.

Clearly the legislature by eliminating the words "and the employee has been paid compensation for temporary disability" intended that the retained words "relating to cases other than temporary disability" should make the entire provision beyond any question of doubt inapplicable to injuries for which temporary disability compensation is payable, and to provide for the contingency of an injury eventually but unpredictedly actually resulting in two distinct classes of compensatory injuries, for example: An unmarried man loses a thumb for which he is paid $720.00 but complications set in and he loses an index finger for which he is paid $450.00, and further complications set in causing him to lose his remaining fingers, so he is paid $270.00 each or $810 more for them. By using the words "in addition to" the employee is assured of receiving the total compensation of $1980.00.

Thus appears the necessity of changing the words "deducted from" to "in addition to," because, otherwise, if the words "and the employee has been paid compensation for temporary disability" had been excluded, without changing "deducted from" to "in addition to" the absurd result might have been that the employee would have been entitled to receive only the last $810.00 for the loss of his three fingers other than thumb and index finger.

In this particular example, the employee doubtless under Section 4 of the Act (Appendix p. 18) would be entitled to receive $2160.00 for the loss of a hand or total loss of use of a hand; but, if so, then from that $2160.00 would be deducted the $1980.00 previously paid to him. He certainly wouldn't be entitled to be paid both the compensation of $1980.00 for the individual loss of his thumb and four fingers, plus $2160.00 for the total loss of his hand.

Fern G. M. Co. v. Murphy, 7 F2d 613, 614, 5 AFR 275, 277.

The words "the amount so paid him" therefore must mean the compensation paid him at the rate at which the injury was first rated for compensation, and before that injury had so developed as to disclose that it actually consisted of two or more distinct classes of compensatory injuries such as the aforesaid example of a loss of a thumb but complications from the injury later also causing the loss of a finger.

While the insertion of the word "other" between the word "some" and the word "provision" doubtless would have clarified its intention, yet this intention of the legislature is the only meaning that is consistent and consonant with Section 4 of the Act. (Appendix pp. 17-18.)

Any other construction of this particular amended subparagraph of Section 1 of the 1946 Act would be directly contrary to the later expressed intention of Section 4 of the Act (Appendix p. 18, infra), that compensation of a lower rating, paid under any subdivi-

sion or part of the schedule, shall be deducted from such, if any, compensation as is later paid upon that injury later being ascertained to be entitled to receive a higher rated compensation.

It will be noted that the words "this schedule" are used throughout the Act to mean the entire compensatory provisions.

See Sections 1, 4 and 6 of Act, Appendix pp. 2, 18, 20.

The first sentence of Section 4 of the present Act reads:

> "If an injured employee entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under *same or* some other part *of* subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her." (Italics supplied.)

This sentence in the 1915, 1923, 1927 and 1929 Acts read:

> "If any injured employee entitled to compensation *hereunder shall be paid compensation* under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under some other part *or* subdivision of this schedule then and in that event he or she shall receive such higher rate, after first deducting the

amount that has already been paid him or her." (Italics supplied.)

Section 4, Chapter 25, Laws of Alaska 1929, page 55;
Section 4, Chapter 77, Laws of Alaska 1927, page 156;
Section 2, Chapter 98, Laws of Alaska 1923, page 242;
Section 2, Chapter 71, Laws of Alaska 1915, page 152.

It appears that the 1946 Act omitted the words "hereunder shall be paid compensation," contained in the 1915, 1923, 1927, and 1929 Acts, and changed the word "or" to "of", and added the words "same or" which were not included in those former Acts. The omission of the words "hereunder shall be paid compensation" makes this sentence unintelligible; in fact, the compiler of Alaska Compiled Laws 1949 took the liberty of trying to cure this ambiguity by inserting the word "is" before the word "entitled". See Section 43-3-4 (Appendix p. 17). The Legislature ratified that inclusion by officially adopting that compilation. Chapter 101, Alaska Session Laws 1951.

Appellant submits that in construing this sentence the omitted words "hereunder shall be paid compensation" must be read into it and that the Court has the power to supply them.

> "Words or phrases may, however, be supplied by the courts and inserted in a statute, where that is necessary to obviate repugnancy and inconsistency in the statute, complete the sense

thereof, and give effect to the intention of the legislature manifested therein."

50 Am. Jur. 222, 234.

The U. S. Court of Appeals for the Ninth Circuit in construing the 1923 Act said:

"To say in a case of this kind that partial destruction of a hand is worse than the amputation of the member at the wrist is as inconsistent with the provisions of the law as it is to say that it is mathematically true that a part is greater than the whole."

Ketchikan Lumber & Shingle Co. v. Walker, 15 F2d 772, 773, 5 AFR 321, 325.

Appellant submits that this principle applies to this case and that Lathourakis' temporary disability could not possibly be greater than his permanent partial disability, because the latter is everlasting, whereas the former is sooner or later ending. Temporariness cannot be as much as permanency.

Furthermore, such, if any, compensation as might be paid or become due Lathourakis under that portion of Section 1 of the Act hereinbefore quoted (see page 28, supra), is subject to the specific limitation of the broad and inclusive language "under same or some other part of subdivision of this schedule," in Section 4 of the Act (quoted page 32, supra).

Furthermore, the payment of the "higher rated compensation," so contained in the quoted first sentence of Section 4, no matter for what classification of disability, is specifically subjected to the latter

restriction in the same sentence "after first deducting the amount that has already been paid" to the employee no matter for what previously lower rated classification of disability.

No exemption from that deduction is made of compensation previously paid for temporary disability, or for any other classification of disability.

The employee "shall receive such higher rate" of compensation; but he must credit thereon or deduct therefrom "the amount that has already been paid him or her."

Only one compensation is to be paid, but that must be at the highest rate to which the injury is entitled under the classification of disability in which it falls.

The present Act's elimination from the quoted subparagraph of Section 1 (page 28, supra) of the words "and the employee has been paid compensation for temporary disability" gives an entirely different meaning than what was or could have been ascribed to the hereinbefore quoted somewhat analogous subparagraph of Section 1 of the 1915, 1923, 1927, and 1929 Acts (page 28, supra).

These particular words, after having been in that sentence for some 31 years, were omitted by the 1946 legislature. Presumably they must have been omitted for some purpose. While the present Act (Appendix p. 52), purportedly repeals the former acts, yet petitioner submits that to it is applicable the rule in the event of omission of words from an amendatory statute, namely:

"The omission of a word in the amendment of a statute, will be assumed to have been intentional. Where the meaning of the prior law is intended to be continued, its terminology is also usually continued, so that an omission of words implies an intended change in the meaning of the statute. Under these rules, the court may not aid a restriction found in a prior statute, but omitted from a later one. Where it is apparent that substantive portions of a statute have been omitted by process of amendment, the courts have no express or implied authority to supply omissions that are material and substantive, and not merely clerical and inconsequential, because that would in effect be the enactment of substantive law."

50 Am. Jur. 263, 276.

While workmen's compensation acts are to be liberally construed, the plain, clear statutory intent is not to be ignored.

The denial to Lathourakis of two disability compensations for one injury does not in any wise prevent him from claiming and receiving compensation for the highest rated compensation to which his injury entitled him.

Section 8 of the Act provides:

"No compensation shall be paid hereunder for an injury which does not incapacitate the employee from earning full wages for a period of at least one day in addition to the day on which the injury occurred, but if incapacity extends

beyond such period compensation shall commence on the second day after the injury."

Appendix p. 21.

Thereby plainly stating that disability compensation is dependent upon loss of full earning capacity.

Similarly did the New York statute.

Judge Pound in construing that statute said in substance that concurrent and consecutive compensation awards violated the plain meaning of the New York Act that the injured employee should be compensated for his disability.

Markhoffer v. Markhoffer, 116 N.E. 379, 380; *Bethlehem Shipbuilding Corporation v. Monahan,* 54 F2d 349, 350.

The Alaskan Act, as seen, specifically directs the payment of the highest rated liability compensation, and does not oblige, should such a situation occur, the employee to accept a lesser sum than that which he has already been paid.

Furthermore if the quoted subparagraph of Section 1 is otherwise construed than as herein contended it is inconsistent with the provisions of Section 4 of the Act by which the former is necessarily controlled.

"In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails."

59 CJ 999.

> "There are cases in which an enumeration of particular things in a statute is held to be limited by general terms following the particular enumerations."
>
> 50 Am. Jur. pp. 248, 251.

Section 4 of the Act specifically provides that on such review before the Board the latter "may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered or agreed to, *subject to the maximum or minimum provided in this Act.*" (Italics supplied.)

Appendix p. 18.

While an injury to a leg may result in total and permanent disability and therefore entitled under the 1915 Act to higher compensation rating than the loss of the leg itself, *Fern G. M. Co. v. Murphy,* 7 F2d 613, 614, 5 AFR 275, 277, it does not follow that the employee could recover both the compensation for the loss of the leg and the compensation for total and permanent disability.

The Board held that Lathourakis sustained, out of the same and one only injury, both temporary disability for more than 300 days and also 50% permanent disability, and that he was entitled to be paid compensation for each even though their total exceeds the maximum compensation allowed by the law for either rated compensation.

Petitioner submits that, assuming but not admitting that it had been proved by competent evidence, La-

thourakis can have either $3055.80 ($2205.00 allowed by court [R. 125] plus the $1050.80 already paid him, totalling $3055.80), or else he can take the $3600.00; but he can't have both because then he is being paid two compensations for one injury in a total excess of the maximum allowed by the Act at whichever of those two disability compensation ratings is correct.

QUESTION 3.

DO THE ALASKA STATUTES EMPOWER THE DISTRICT COURT OF ALASKA TO ALLOW AN ATTORNEY FEE AS COSTS AGAINST THE LOSING LITIGANT, EITHER EMPLOYER OR EMPLOYEE, ON A REVIEW BEFORE IT ON APPEAL FROM THE ALASKA INDUSTRIAL BOARD'S FINDINGS, DECISION, AND AWARD OF A CLAIM FOR WAGE COMPENSATION UNDER THE ALASKA WORKMEN'S COMPENSATION ACT (APPENDIX p. 1)?

The United States Court of Appeals, in affirming the District Court's allowance of an attorney fee of $350.00 to Lathourakis (R. 125) erroneously concluded that costs in ordinary civil suits are governed by Sec. 55-11-51, ACLA 1949, viz.:

> "The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums *by way of indemnity for his attorney's fees* in maintaining the action or defense thereto, which allowances are termed costs." (Italics supplied.)

hence, inasmuch as Section 3 of the Act provides:

> "In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court."
> Sec. 43-3-17, ACLA 1949. (Appendix p. 32.)

clear authority existed to award the attorney's fee. (Opinion, Lathourakis, R. 146, based on Opinion, Landro, R. 100.)

Sec. 55-11-51, supra, is identical with Sec. 561, Oregon Laws (now Sec. 10-904, Ore. CLA, Vol. 2), except the latter contains the added words "or suit" between the words "action" and "or". Since June 6, 1900, 31 Stat. L. 415-418, this statute has been in effect in Alaska. Cf. Sec. 4061, ACL 1933; Sec. 1341, ACL 1913; Sec. 509, p. 253, Carter's Alaska Code, formerly Sec. 548, Hill's Ann. Ore. Laws, 2d Ed., 1892, Vol. 1; Sec. 538, General Laws of Oregon, Oct. 11, 1862, Deady & Lane, Ed. 1892, p. 222.

For many years and by many decisions the Oregon Supreme Court has held this statute does not of itself authorize the allowance of an attorney fee as costs.

In holding that an attorney's fee could not be allowed a successful plaintiff vendee in a suit for specific performance of contract, the Oregon Court said:

> "Attorney's fees are recoverable only when provided for by law or by contract." (Quoting Sec. 561, Ore. Laws, supra.) "As used in this statute, the term 'costs' 'properly includes only

the indemnity for attorney fees fixed by statute.' "

Garett v. Hunt, 245 P. 231,

citing five prior Oregon decisions, including one decided in about 1872, viz.:

Wood v. Fitzgerald, 3 Ore. 568, 584, 585,

wherefrom it appears that an attorney fee cannot be allowed as costs to a plaintiff unless the suit is one of the classes specified in Sec. 55-11-52, ACLA 1949 (formerly Sec. 4062, CLA 1933; Sec. 1342, CLA 1913; Sec. 510, Carter's Alaska Code; Sec. 549, Hill's Anno. Oregon Laws 1892; Sec. 539, Ore. Laws, Oct. 11, 1862), which reads:

"*Costs allowed of course to plaintiff.* Costs are allowed, of course, to the plaintiff upon a judgment in the district court in his favor in the following cases:

"First. In an action for the recovery of the possession of real property, or where a claim of title or interest in real property, or right to the possession thereof, arises upon the pleadings, or is certified by the court to have come in question upon the trial;

"Second. In actions for fines and forfeitures, and the actions provided for in chapters two and four of title fifty-six;

"Third. In an action involving an open mutual account, where it appears to the satisfaction of the court that the sum total of such accounts of both parties exceeds one hundred and fifty dollars;

"Fourth. In an action for the recovery of personal property;

> "Fifth. In an action not hereinbefore specified, for the recovery of money or damages, when the plaintiff shall recover fifty dollars or more.
>
> "But in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, seduction, or breach of promise of marriage, if the plaintiff recovers less than fifty dollars damages, he shall recover no more costs and disbursements than damages; and in an action to recover the possession of personal property, if the plaintiff recover property or the value thereof, as established on the trial, and damages for the detention of the same, in all less than fifty dollars, he shall recover no more costs and disbursements than the sum of such value and damages."

and, also, unless specifically allowed as a cost or disbursement by Sec. 55-11-55, ACLA 1949 (formerly, except as to additional items, Sec. 4065, CLA 1933; Sec. 1345, ACL 1913; Sec. 513, Carter's Alaska Code; Sec. 553, Hill's Anno. Oregon Laws 1892; Sec. 543, General Laws of Oregon, Oct. 11, 1862), wherein, not until March 27, 1947, subsequent to the enactment on April 1, 1946, of the Workmen's Compensation Act, with its Section 43-3-17, supra, was included the item: "and a reasonable attorney's fee to be fixed by the Court." (Ch. 84, ASL 1947.) Therefore, the Legislature in enacting Sec. 43-3-17, supra, could not have had in mind the allowing of an attorney fee to either employee or employer in workmen's compensation cases before the District Court.

At the expense of brevity, the Oregon lineage of two other Alaska statutes must be stated to disclose the pertinency of Oregon decisions to the subject.

The allowance to a successful defendant of an attorney fee as an item of cost is governed by Sec. 541, Oregon Laws, Oct. 11, 1862; Sec. 551, Hill's Anno. Oregon Laws 1892, which became by the Act of June 6, 1900, Sec. 513, p. 254, Carter's Alaska Code; Sec. 1344, ACL 1913; Sec. 4064, CLA 1933, now Sec. 55-11-54, ALCA 1949.

Sections 539, 543, 541, Oregon Laws Oct. 11, 1862, are all the subject of *Wood v. Fitzgerald,* supra.

In manner unknown to petitioner, upon the adoption for Alaska of Sec. 541, Oregon Laws Oct. 11, 1862, on June 6, 1900, 31 Stat. L. 415-418, the reference therein to Section 539 was changed to Section 540 (otherwise, the language is identical), which change has been maintained throughout the Alaska history of this Section, which reads:

> "*Costs allowed defendant in one of several actions for same cause or one of several defendants.* Costs are allowed, of course, to the defendant in the actions mentioned in Section 55-11-53 unless the plaintiff be entitled to costs therein; and when there are several defendants not united in interest, and making separate defenses by separate answers, costs shall be allowed or not to each of such defendants as if the action were commenced against him separately."
>
> Sec. 55-11-54, ACLA 1949; Sec. 4064, CLA 1933; Sec. 1344, CLA 1913; Sec. 512, Carter's Alaska Code; formerly, except for changed section reference, Sec. 541, Oregon Laws Oct. 11, 1862; Sec. 511, Hill's Anno. Oregon Laws 1892.

Hence, the successful defendant by Alaskan statute can only be allowed an attorney fee when authorized by Sec. 55-11-53, ACLA 1949, which reads:

> "*Several actions for same cause.* When several actions shall be prosecuted for the same cause of action, against several parties who might have been joined as defendants in the same action, disbursements shall be allowed the plaintiff in each action if he prevail therein; but costs shall not be allowed such plaintiff in more than one of such actions, which shall be at his election, unless the party or parties prosecuted in such other action or actions shall at the time of the commencement of the previous action have been without the Territory or secreted therein."
>
> Sec. 55-11-53, ACLA 1949; Sec. 4063, CLA 1933; Sec. 1343, CLA 1913; Sec. 511, Carter's Alaska Code; formerly Sec. 540, Oregon Laws Oct. 11, 1862; Sec. 550, Hill's Anno. Oregon Laws 1892.

"'Costs' are certain sums to be allowed to prevailing party in the judgment or decree by way of indemnity for his attorney's fee in maintaining the action or suit or defense thereto. Ore. L. Sec. 561. Disbursements, on the other hand, are the necessary expenses connected with the prosecution or defense of the litigation. Ore. L. Sec. 566. Costs are fixed by Sec. 565, Ore. L. * * * the distinction between 'costs' and 'disbursements' has not always been observed, but the fact is that the two are entirely distinct; costs being fixed in amount as a conclusion of law, while disbursements vary according to the actual expenditures

in the litigation, and mainly involve questions of fact."

In re Pitttock's Estate (Ore.), 202 P. 216, 217.

The learned United States Court of Appeals for the Ninth Circuit held that costs are statutory and disallowed an attorney fee in

Mutual &c. Ass'n, v. Moyer, 94 F2d 906, cert. den. 304 US 581.

The learned trial Court held an attorney fee could not be allowed to the plaintiff because, inter alia, an interpleader suit was not one of the cases mentioned in Sec. 55-11-52, supra, then Sec. 4062, CLA 1933.

United &c. Co. v. Elliott, et al., 11 Alaska R. 466, 476.

Workmen's compensation claims are not within the category of cases specified in either Sections 55-11-52 or 55-11-53, supra.

Petitioner submits that the questions stated in the petition should be settled by this Court and a writ of certiorari to that end should issue.

Dated at Juneau, Alaska,
November 9, 1951.

Respectfully,
R. E. ROBERTSON,
BOGLE, BOGLE & GATES,
Counsel for Petitioner.

(Appendix Follows.)

Appendix

Compilation of Workmen's Compensation Act of Alaska, Chapter 9, SLA 1946, entitled

> "AN ACT. Relating to the measure and recovery of compensation of injured employees in all businesses, occupations, work, employments and industries in the Territory of Alaska, except domestic service, agriculture, dairying and the operation of railroads as common carriers, and relating to the compensation to designated beneficiaries where such injuries result in death, defining and regulating the liability of employers to their employees in connection with such businesses and industries; providing for a second injury fund; creating an Industrial Board, and defining its duties; making the Territorial Department of Labor the administrative agency to carry into effect the provision of this Act; providing for penalties, and repealing Section 2161 to Section 2203, inclusive, Compiled Laws of Alaska, 1933, as amended by Chapter 84, Session Laws of Alaska 1935, Chapter 74, Session Laws of Alaska 1937, Chapter 49, Session Laws of Alaska 1939, Chapter 44, Session Laws of Alaska 1941, and Chapter 63, Session Laws of Alaska 1937."

as amended by Chapter 45, SLA 1947, entitled

> "AN ACT. Amending the Workmen's Compensation Act, Chapter 9, Session Laws of Alaska, 1946, to relieve minor surviving children in remote and isolated sections of the Territory from the consequences of failure to file a claim within the time prescribed by Section 29 of the Act.",

now compiled as Section 43-3-1 to 43-3-39, ACLA 1949.

§43-3-1. Employment covered: Compensation allowed: Death benefits: Total and permanent disability: Partial permanent disability: Disfigurement: Temporary disability: Loss of members: Amputations: Other permanent partial injuries: Payments to second injury fund: Fund beneficiaries: Refund of payments to fund: Injury causing permanent disability when combined with previous disability. Any person, or persons, partnership, joint stock company, association or corporation, employing three or more employees in connection with any business, occupation, work, employment or industry, carried on in this Territory, including any department, agency or instrumentality of the Territorial Government, Municipality or Public Utility District, except domestic service, agriculture, dairying, or the operation of railroads as common carriers, shall be liable to pay compensation in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives a personal injury arising out of and in the course of his or her employment or to the beneficiaries named herein, as the same are hereinafter designated and defined in all cases where the employee shall be so injured and such injuries shall result in his or her death.

(COMPENSATION ALLOWED.) The compensation to which such employee so injured, or, in case of his or her death, if death results from such injury,

such beneficiaries shall be entitled, and for which such employer shall be legally liable, shall be as follows:

(1) (AMOUNT OF DEATH BENEFITS.) In the event of the death of any such employee resulting from such injury, where such employee at the time of his death was married, his widow shall be entitled to receive the sum of Four Thousand Five Hundred Dollars ($4,500.00).

(2) (CHILDREN). In those cases where such married employees had a child or children under the age of eighteen (18) years at the time of his death, his widow shall be entitled to receive in addition to the sum above specified, the sum of Nine Hundred Dollars ($900.00) for each child under the age of eighteen (18) years, or child wholly dependent upon his or her parents for support by reason of mental or physical incompetency, or unborn or posthumous child, which such employee left at the time of his decease, but not to exceed in all the sum of Nine Thousand Dollars ($9,000.00).

(3) (DEPENDENT PARENTS.) In those cases where such employee left either father or mother or both, dependent upon him for support at the time of his death, the sum of Nine Hundred Dollars ($900.00) each shall be paid to such father or mother or both, in addition to the sum provided for and made payable to the widow. In no case, however, is the total sum to be paid hereunder to exceed the sum of Nine Thousand Dollars ($9,000.00) and the payments to which the widow and children may be entitled shall be first

paid out of said sum of Nine Thousand Dollars ($9,000.00).

(4) (NON-DEPENDENT PARENTS.) In those cases where such deceased employee was unmarried at the time of his or her death survived by either his or her father or mother, such father or mother shall be paid the sum of One Thousand Eight Hundred Dollars ($1,800.00); and, in addition thereto, the employer shall be required to pay the funeral expenses not to exceed the sum of One Hundred Ninety-five Dollars ($195.00) and such other expenses, if any, arising after the injury and before the death not to exceed One Hundred Ninety-five Dollars ($195.00).

(5) (NON-DEPENDENT PARENTS.) Where such deceased employee was unmarried and was survived by his or her father and mother, such father and mother shall be paid the sum of One Thousand Eight Hundred Dollars ($1,800.00) each; and, in addition thereto, the employer shall be required to pay the funeral expenses not to exceed the sum of One Hundred Ninety-five Dollars ($195.00) and such other expenses, if any, arising after the injury and before his death not to exceed One Hundred Ninety-five Dollars ($195.00).

(6) (WIDOWER WITH DEPENDENT MINORS: GUARDIAN.) In those cases where such deceased employee was a widower at the time of his death, but left one or more minor orphan children or child wholly dependent upon the deceased for support

by reason of mental or physical incompetency, there shall be paid the sum of Four Thousand Five Hundred Dollars ($4,500.00), and the further sum of Nine Hundred Dollars ($900.00) for each orphan child under the age of eighteen (18) years provided the total amount paid shall not exceed Nine Thousand Dollars ($9,000.00), and the judge of the Probate Court of the precinct wherein such accident or injury occurred, shall appoint a guardian for all of said children, who shall be entitled to, and who shall be paid, the amount specified in this paragraph, for the benefit of said orphan children, and shall divide Four Thousand Five Hundred Dollars ($4,500.00) thereof equally among such children and divide the surplus, if any, among the children under eighteen (18) years of age.

(7) (AMOUNTS PAID NON-RESIDENT NON-CITIZEN BENEFICIARIES.) Provided, however, that if such beneficiary or beneficiaries as described in subdivisions 1 to 6, inclusive, immediately preceding this subsection be neither resident or a citizen of the United States of America, then the amount due and payable to such beneficiary or beneficiaries shall be in amounts as follows:

(a) As to all beneficiaries, except a wife or minor children, fifty per centum (50%) of the sum set forth in subdivisions 1 to 6, immediately preceding, and fifty per centum (50%) shall be paid to the second injury fund, for the sole benefit of those entitled to participate therein, as hereinafter provided.

(b) As to a wife or minor children, sixty per centum (60%) of the sums set forth in subdivisions 1 to 6 immediately preceding, and forty per centum (40%) of the second injury fund, for the sole benefit of those entitled to participate therein, as hereinafter provided.

(8) (FUNERAL EXPENSES: PAYMENT TO SECOND INJURY FUND). In those cases where such deceased employee was, at the time of his or her death unmarried, and leaves no children nor father nor mother, the employer shall be required to pay the funeral expenses of the deceased not to exceed the sum of One Hundred Ninety-five Dollars ($195.00), and such other expenses, if any, arising after the injury and before the death, not to exceed the further sum of One Hundred Ninety-five Dollars ($195.00), and in addition thereto shall pay to the second injury fund the sum of One Thousand Five Hundred Dollars ($1,500.00), for the sole benefit of those entitled to participate therein as hereinafter provided.

(SECOND INJURY FUND.) There is hereby created a Second Injury Fund, to be administered by the Commissioner of Labor in accordance with the orders and awards of the Alaska Industrial Board.

(TOTAL AND PERMANENT DISABILITY.) Where any such employee receiving an injury arising out of, and in the course of his or her employment, as the result of which he or she is totally or permanently disabled, he or she shall be entitled to receive compensation as follows:

(a) (MARRIED PERSON.) If such employee was at the time of his injury married he shall be entitled to receive Seven housand Two Hundred Dollars ($7,200.00) with Nine Hundred Dollars ($900.00) additional for each child under the age of eighteen (18) years, but the total to be paid shall not exceed Nine Thousand Dollars ($9,000.00).

(b) (FATHER AND MOTHER.) If such employee at the time of his injury had no wife or children, but has a mother or father, Six Thousand Three Hundred Dollars ($6,300.00).

(c) (FATHER AND MOTHER.) In cases, where such employee who at the time of his injury had both father and mother, Six Thousand Five Hundred Dollars ($6,500.00).

(d) (MINOR CHILDREN). In those cases, where such employee was at the time of his injury, a widower, or was divorced, but had minor children, he shall receive the sum of Six Thousand Dollars ($6,000.00), with an additional sum of Nine Hundred Dollars ($900.00) for each child below the age of eighteen (18) years, provided that the total sum to be paid such employee shall not in any case exceed the sum of Nine Thousand Dollars ($9,000.00).

(e) (NO DEPENDENTS.) In those cases where such employee so injured at the time of his injury was unmarried and had no children nor father nor mother, he shall receive the sum of Six Thousand Dollars ($6,000.00).

(PARTIAL PERMANENT DISABILITY.) Where any such employee receives an injury arising out of, and in the course of his or her employment, resulting in his or her partial permanent disability, he or she shall be paid in accordance with the following schedule:

For the loss of a Thumb:

1 (a) In case the employee was at the time of injury unmarried, $720.00.

1 (b) In case the employee was married but had no children, $900.00.

1 (c) In case the employee was either married or a widower, but had one or more children, $1,080.00.

For the loss of an Index Finger:

2 (a) In case the employee was at the time of the injury unmarried, $450.00.

2 (b) In case the employee was married but had no children, $585.00.

2 (c) In case the employee was either married or a widower, but had one or more children, $720.00.

For the loss of any other finger than the Index Finger and Thumb, $270.00.

For the loss of a Great Toe, $450.00.

For the loss of any other Toe other than the Great Toe, $180.00.

For the loss of a Hand:

3 (a) In case the employee was at the time of the injury unmarried, $2,160.00.

3 (b) In case the employee was married but had no children, $2,880.00.

3 (c) In case the employee was either married, or a widower and had one child, $2,880.00 and $360.00 additional for each additional child, not to exceed, however, the total sum of $3,600.00.

For the loss of an Arm:

4 (a) In case the employee was at the time of the injury unmarried, $2,700.00.

4 (b) In case the employee was married but had no children, $3,600.00.

4 (c) In case the employee was either married, or a widower and had one child, $3,600.00 and $450.00 additional for each such additional child, the total amount not to exceed, however, $4,500.00.

For the loss of a Foot:

5 (a) In case the employee was at the time of the injury unmarried, $2,160.00.

5 (b) In case the employee was married but had no children, $2,700.00.

5 (c) In case the employee was either married, or a widower and had one child, $2,880.00 and $360.00 additional for each additional child, but not to exceed the total sum of $3,600.00.

For the loss of a Leg:

6 (a) In case the employee was at the time of the injury unmarried, $2,700.00.

6 (b) In case the employee was married but had no children, $3,600.00.

6 (c) In case the employee was either married, or a widower and had but one child, $3,600.00 with $450.00 for each such additional child, not to exceed the total sum of $4,500.00.

For the loss of an Eye:

7 (a) In case the employee was at the time of the injury unmarried, $2,160.00.

7 (b) In case the employee was married but had no children, $2,880.00.

7 (c) In case the employee was either married, or a widower and had one child, $2,880.00 plus $360.00 for each additional child, not to exceed, however, the total sum of $3,600.00.

For the loss of an Ear: $360.00.

For the loss of hearing in one Ear: $720.00.

For the loss of the Nose: $720.00.

Compensation for permanent total loss of use of a member shall be the same as for the loss of such member.

(DISFIGUREMENT.) The Industrial Board may award proper and equitable compensation for serious head, neck, facial, or other disfigurement, not exceeding, however, the sum of Two Thousand Dollars ($2,000.00).

(TEMPORARY DISABILITY.) For all injuries causing temporary disability, the employer shall pay

the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.

(LOSS OF MEMBERS AS TOTAL PERMANENT DISABILITY.) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or

any two thereof, or hearing in both ears, shall constitute total and permanent disability and be compensated according to the provisions of this Act with reference to total and permanent disability.

(AMPUTATIONS.) Amputation between the elbow and the wrist shall be considered equivalent to the loss of an arm, and amputation between the knee and ankle shall be considered equivalent to the loss of a leg.

(OTHER PERMANENT PARTIAL INJURIES.) Whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, and the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity such employee by reason of the injury, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Seven Thousand Two Hundred Dollars ($7,200.00).

To illustrate: If said employee were of a class that would entitle him or her to Seven Thousand Two Hundred Dollars ($7,200.00) under this schedule, if he or she were totally and permanently disabled, and his or her injury would be such as to reduce his or her

earning capacity twenty-five per centum (25%), he or she would be entitled to receive One Thousand Eight Hundred Dollars ($1,800.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars ($7,200.00) that twenty-five per centum (25%) does to one hundred per centum (100%). Should such employee receive an injury that would impair his or her earning capacity seventy-five per centum (75%), he or she would be entitled to receive Five Thousand Four Hundred Dollars ($5,400.00), it being the amount that bears the same relation to Seven Thousand Two Hundred Dollars ($7,200.00) that seventy-five per centum (75%) does to one hundred per centum (100%).

(9) (PAYMENTS TO SECOND INJURY FUND.) Whenever an employee shall suffer a compensable injury which results in permanent partial disability by reason of the total or partial loss or loss of use of a member or members, as provided in Paragraph (8) hereof, and which injury entitled him or her to compensate pursuant to such Paragraph (8), the employer, or his insurance carrier, shall, in addition to the compensation provided for in said Paragraph (8), pay into the second injury fund a lump sum, without interest deductions, equal to two per centum (2%) of the total compensation to which the employee is entitled under said Paragraph (8) of this section for the said permanent partial disability, the said sum to be paid into such second injury fund as soon as the total amount of the permanent partial dis-

ability payable for the particular injury is determined by the Industrial Board.

(10) (SECOND INJURY FUND BENEFICIARIES.) The sums required to be paid into the second injury fund under the provisions of Paragraph (7), (8) and (9) of this section shall be paid into said second injury fund of the Commissioner of Labor for the sole benefit of those entitled to participate therein under the provisions of Paragraph (12) of this section, the same to be paid out by said Commissioner of Labor in accordance with the orders and awards of the Industrial Board.

(11) (REFUND OF PAYMENTS TO SECOND INJURY FUND.) In case a deposit or payment has been made into such second injury fund, as provided in Paragraph (7) of this section, and it is later shown that there are other beneficiaries or that the beneficiaries designated are entitled to further or greater benefits, or, as provided in Paragraph (8) of this Section, and it is later shown that there are beneficiaries entitled to compensation, or, if deposits or payment has been made pursuant to Paragraph (9) hereof by mistake or inadvertence or under such circumstances that justice requires a refund thereof, the Industrial Board is hereby authorized to refund such deposit or payment.

(12) (INJURY CAUSING TOTAL PERMANENT DISABILITY WHEN COMBINED WITH PREVIOUS DISABILITY.) In those cases where an employee receives an injury arising out of and in

the course of his or her employment which, of itself, would cause only permanent partial disability but which, combined with a previous disability or injury, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury; provided, however, that in addition to compensation for such permanent partial disability and after the cessation of the payments for the amounts prescribed therefor, the injured employee shall be paid the remainder of the compensation that would be due for permanent total disability out of the second injury found hereinbefore created and provided.

§ 43-3-2. **Treatment and care of injured employees: Duty and liability of employer: Duration: Prevailing fees: Selection of physicians, surgeons and hospitals: Aggravation of injuries by incompetence or neglect of physician: Liability: Right of employee to provide physician.** The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus for such period as the nature of the injury or the process of recovery may require, not exceeding one year from and after the date of injury to any such employee. The employer shall be liable for the payment of the expenses of medical, surgical or other attendance or treatment, nurse, and hospital service, medicine, crutches, and apparatus necessitated by the injury of an employee, for such period as the nature of the injury or the process of recovery may require, not exceeding one

year from and after the date of injury to any such employee. All fees and other charges for such treatment and services shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living. The employer shall have the exclusive right, and it shall be his duty to select and furnish the necessary physicians, surgeons and hospitals and to that end he may enter into all necessary contracts with such physicians, surgeons and hospitals for the furnishing of such services and treatments. Provided, that if it be made to appear in any suit, action or proceeding brought against the employer that the injuries sustained by the employee were aggravated on account of the incompetence or neglect of the physician or surgeon selected by the employer, it shall be prima facie evidence that the employer failed to use due care in the selection of such physician or surgeon and in such case the employer and physician or surgeon shall be jointly and separately liable for all damages resulting from such incompetence or neglect. Nothing contained in this section shall be construed to limit the right of the employee, to provide in any case, at his own expense, a consulting physician or any attending physician whom he may desire.

§ 43-3-3. Time and manner of paying compensation: Interest: Failure to pay compensation: Penalty. All compensation allowed hereunder for temporary disability shall be paid periodically and promptly in like manner as wages, and as it accrues, and directly to the person entitled thereto, without waiting for an

award by the Industrial Board, and shall bear interest from and after the period of thirty days after the date of the injury by which the claim for compensation arose at the rate of eight per centum (8%) per annum until paid. If the employer or insurance carrier shall fail to pay any installment of compensation within twenty days after the same becomes due, there shall be paid by the employer, or his insurance carrier, an additional sum equal to ten per centum (10%) of the compensation then due, unless such delay or default is excused by the Industrial Board, on the application of the employer or insurance carrier and upon the ground that owing to conditions over which the employer or insurance carrier had no control, such payment could not be made.

In all other cases, compensation shall be paid biweekly, monthly, or otherwise, as the Industrial Board may determine to be for the best interest of the injured employee or his or her beneficiaries; and such payments shall bear interest from and after the period of thirty days after the date of the order or award. If the employer or insurance carrier shall fail to pay compensation according to the terms of such order or award within twenty days thereafter, except in the case of an appeal, there shall be paid by the employer, or his insurance carrier, an additional sum equal to twenty per centum (20%) of the compensation due.

§ 43-3-4. Modification of compensation: Continuing jurisdiction: Effect of review upon moneys already paid: Limitations of time. If an injured employee (is)

entitled to compensation under any subdivision or part of this schedule, and it shall afterwards develop that he or she is or was entitled to a higher rate of compensation under same or some other part or subdivision of this schedule, then and in that event he or she shall receive such higher rate, after first deducting the amount that has already been paid him or her. To that end the Industrial Board is hereby given and granted continuing jurisdiction of every claim, and said Board may, at any time and upon its own motion or on application, review any agreement, award, decision or order, and on such review, may make an order or award ending, diminishing or increasing the compensation previously awarded, ordered, or agreed to, subject to the maximum or minimum provided in this Act. No such review shall affect such award, order or settlement as regards any moneys already paid, except that an award or order increasing the compensation rate may be made effective from a date of injury, and except that if any part of the compensation due or to become due is unpaid an award or order decreasing the compensation rate may be made effective from the date of injury, and any payments made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such methods as may be determined by the Industrial Board; provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury.

§ 43-3-5. Lien to secure compensation: Extent Priority and rank: Notice of lien: Filing and contents: Enforcement: Attachment. Every employee and every beneficiary entitled to compensation under the provisions of this Act shall have a lien for the full amount of such compensation, including costs and disbursements of suit and attorneys' fees therein allowed or fixed, upon all of the property in connection with the construction, preservation, maintenance or operation of which the work of such injured or deceased employee was being performed at the time of the injury or death of such employee. For example: In the case of an employee injured or killed while engaged in mining or in any work connected with mining, the lien shall extend to the entire mine and all property used in connection therewith; and in the case of an employee injured or killed while engaged in fishing or in the packing, canning or salting of fish, or other branch of the fish industry, the lien shall extend to the entire packing, fishing, salting or canning plant or establishment and all property used in connection therewith; and the same shall be the case with all other businesses, industries, works, occupations and employments. The lien herein provided for shall be prior and paramount and superior to any other lien of the property affected thereby, except liens for wages or materials as is now or may hereafter be provided by law, and shall be of equal rank with all such liens for wages or materials. The lien hereby provided for shall extend to and cover all right, title, interest and claim of the employer of, in and to the property affected by

such lien. Any person claiming a lien under this Act shall, within four months after the date of the injury from which the claim of compensation arises, file for record in the office of the recorder of the precinct in which the property affected by such lien is situated a notice of lien signed and verified by the claimant or some one on his or her behalf, and stating substance, the name of the person injured or killed out of which injury or death the claim of compensation arises, the name of the employer of such injured or deceased person at the time of such injury or death, a description of the property affected or covered by the lien so claimed, and the name of the owner or reputed owner of such property.

The lien for compensation herein provided may be enforced by a suit in equity as in the case of the enforcement of other liens upon real or personal property, at any time within ten months after the cause of action shall arise. Nothing in this Section contained shall be deemed to prevent an attachment of property as security for the payment of any compensation as in this Act provided.

§43-3-6. Compromise: Filing memorandum: Approval by Board: Effect: When agreement to be approved. At any time after death, or after seven days subsequent to the date of the injury, the employer and the employee or the beneficiary or beneficiaries, as the case may be, shall have the right to reach an agreement in regard to any claim for injury or death hereunder in accordance with the schedule hereof, but

a memorandum of the agreement, in a form prescribed by the Industrial Board shall be filed with the Board, otherwise the same shall be void for any purpose. If approved by the Board, such agreement shall be enforceable the same as any order or award of the Board, and subject only to modification in accordance with the provisions of Section 4 hereof (§ 43-3-4 herein). Such agreement shall be approved by the Board only when the terms conform to the provisions of this Act, and, if it involves or is likely to involve permanent disability, only after an impartial examination and an opportunity to be heard.

§43-3-7. Injuries not covered. No compensation shall be allowed or paid for the injury or death of an employee in any case where such injury or death was occasioned by his or her wilful intention to bring about the injury or death of himself or herself or of another, or where the employee's intoxication was the proximate cause of injury.

§ 43-3-8. When right to compensation accrues: Period of incapacity: Report to employer: Compensation not to be paid prior to report. No compensation shall be paid hereunder for any injury which does not incapacitate the employee from earning full wages for a period of at least one day in addition to the day on which the injury occurred, but if incapacity extends beyond such period compensation shall commence on the second day after the injury. It shall be the duty of every person claiming compensation under the provisions of this Act for any injury sustained by him to make or cause to be made, a report thereof to his em-

ployer as soon as practicable after sustaining the same, and no compensation shall be paid prior to the day on which such report is made.

§43-3-9. Presumption of employment: "Independent contractors" defined. Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this Act. The term "independent contractor" shall be taken to mean, for the purpose of this Act, any person who renders service, other than manual labor, for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

§43-3-10. Right to compensation exclusive: Failure to secure insurance: Election of remedies: Pleading or proof of contributory negligence unnecessary: Defenses barred. The right to compensation for an injury and the remedy therefor granted by this Act shall be in lieu of all rights and remedies as to such injury now existing either at common law or otherwise, and no rights or remedies, except those provided for by this Act, shall accrue to employees entitled to compensation under this Act while it is in effect; nor shall any right or remedy, except those provided for by this Act accrue to the person or legal representative, dependents, beneficiaries under this Act, or next of kin of such employee; provided, however, that if an employer fails to secure the payment of compensation as required by this Act, by insuring with an authorized insurance carrier or by meeting the requirements for

self-insurance, then any injured employee, or, in case of death, his or her beneficiaries, may, at his, her or their option, elect to claim compensation under this Act or to maintain an action in the courts for damages on account of such injury or death; and, in the event of his, her or their election to bring such action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant employer plead or prove as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due, in whole or in part, to the contributory negligence of the employee.

§ 43-3-11. Step-parents, adopted children, and step-children: How regarded. Step-parents shall be regarded in this Act as parents, and an adopted child, or adopted children, or a step-child or children, shall be regarded in this Act as issue of the body.

§ 43-3-12. Statement of beneficiaries by employee: Change in beneficiaries or address: Notice to beneficiaries: Form: Failure to list or notify beneficiaries: Employee's statement as evidence: Service of notice of claim.

(a) (STATEMENT OF BENEFICIARIES BY EMPLOYEE.) Every employer coming within the provisions of this Act shall require of every employee who shall execute the same, either at the time he or she is employed or thereafter, a written statement showing the name or names of each and all persons that would be entitled to benefits under the provisions of this Act in case such employee should become deceased

as a result of any injury received by him, or her, arising out of and in the course of his or her employment, such written statement shall bear the date upon which the same shall be furnished to the employer, and shall be signed by the employee. Provided, that, in cases where such employee is unable to write his or her name, his or her name may be affixed to such statement by another, and such employee shall make his or her mark in the manner customary in such cases and such mark shall be made in the presence of at least one witness, who shall subscribe such statement as a witness. In all cases the employee shall be furnished a duplicate of the said statement.

(b) (CHANGE IN BENEFICIARIES OR ADDRESS THEREOF.) In all cases where there shall be a change of beneficiaries, or a change in the address of any beneficiary, the employee may furnish the employer with a new statement showing such change, such new statement to be so furnished shall in all respects conform and comply with the provisions hereof with reference to the original statement to be furnished.

(c) (NOTICE TO BENEFICIARIES.) In all cases where such statement, or statements, is, or are, furnished the employer by the employee, the employer shall, if such employee becomes deceased as a result of an injury received in the course of his or her employment, notify each beneficiary named in the last statement of the fact; such notice shall be given by sending each beneficiary at the address given in the last statement furnished a copy of such notice by

registered mail, and an envelope containing such notice addressed to each beneficiary at the address given in said last statement furnished, shall be deposited in the post office and registered, within ten days after such employee shall have become deceased.

(d) (NOTIFICATION FORM.) The notice to be given shall be substantially in the following form:

To .....(giving the name of the beneficiary).

This is to advise you that.....(giving the name of the deceased person) became deceased on the.....day of.....as a result of an injury received while in the employ of..... You will take notice that all persons entitled to benefits because of the fact that the above named employee was injured and as a result thereof became deceased, under the laws of Alaska, are required to serve notice upon the employee with one hundred and twenty (120) days after the date on which such employee became deceased, in accordance with the provisions of the laws of Alaska upon that subject, and that failure to serve such notice within the time specified and in the manner specified will result in depriving the beneficiary, failing to give such notice within such time and in such manner, of his or her rights to compensation under the laws of Alaska.

(e) (FAILURE OF EMPLOYEE TO LIST BENEFICIARIES.) Any failure on the part of the employee to supply the employer with a statement as hereinabove provided shall not work a forfeiture of

the right of his or her beneficiaries to benefits hereunder.

(f) (FAILURE OF EMPLOYER TO NOTIFY BENEFICIARIES.) In cases where the employer shall have been furnished with such statements and shall fail to notify the beneficiaries therein named as shown by the last statement furnished, within the time and manner herein provided, such beneficiaries who have not been so notified shall have the right to notify the employer of their claims to benefits and file claims and prosecute actions or other proceedings for the recovery thereof, notwithstanding the fact that such notice was not served as hereinafter provided within the period of one hundred and twenty (120) days from and after the time the employee became deceased.

(g) (EMPLOYEE'S STATEMENT AS EVIDENCE.) Upon the trial of any issue relating to a beneficiary's right to compensation under this Act, any written statement furnished an employer, as hereinabove provided, may be offered in evidence and shall be prima facie but not conclusive evidence that there are no other beneficiaries.

(h) (NOTICE OF BENEFIARY'S CLAIM: SERVICE.) In all cases where any person claims to be a beneficiary under this Act entitled to compensation because of an injury to an employee coming within its provisions, which resulted in such employee's death, someone in his or her behalf shall within one hundred and twenty (120) days from and after the death of such employee serve a written notice upon

the employer, which notice shall contain the name and address of the person claiming to be such beneficiary, the relationship existing between such beneficiary and the deceased, and if such beneficiary shall be either the father or mother of the deceased, such notice shall also contain a statement showing that such persons were dependent upon the earnings of the deceased. Such notice shall be liberally construed and no claim for compensation shall be denied because of any defect in the notice, provided it appears that a notice was served with a bona fide intention to comply with the provisions of this Act. Such notice may be served by any person of legal age by delivering a copy thereof to the employer or the employer's agent in person or by leaving a copy thereof at the employer's principal place of business within the Territory of Alaska with some person over the age of eighteen (18) years in the employ of such employer, or by mailing the same by registered mail, addressed to said employer at his last known business address. If the employer cannot be found within the Territory and has no known agent or place of business therein, such beneficiary may serve such notice by registered mail upon the Industrial Board, and it shall be the duty of such Industrial Board to publish the same in one issue of any newspaper of general circulation published in the Judicial Division where the injury, out of which the right to compensation arose, occurred. Failure to give such notice shall not bar any claim (1) if the employer or his agent in charge of the business at the place where the injury occurred, or the insurer, had knowledge of

the injury or death and the Industrial Board determines that the employer or insurer has not been prejudiced by the failure to give such notice; or (2) if the Industrial Board finds that there was good cause for not giving such notice; Provided that no objection based on such failure shall be considered unless made at the first hearing of the claim before the Board. In case of doubt as to the proper beneficiaries, the employer shall submit the matter to the determination of the Industrial Board.

§43-3-13. Notice in non-fatal cases: No compensation until notice or knowledge: Defective notice: Prejudice: Contents of notice: Signature and service. In all cases of injury not resulting in death, unless the employer or his agent shall have actual knowledge of the occurrence of the injury at the time thereof, or shall acquire such knowledge afterward, the injured employee, or someone in his or her behalf, as soon as practicable after the injury, shall give written notice to the employer of such injury, such notice may be given in the manner provided in paragraph (h) of Section 12 (§ 43-3-12 herein).

Unless such notice is given or knowledge acquired within sixty days from the date of the injury, no compensation shall be paid until and from the date such notice is given or knowledge obtained, but no lack of knowledge by the employer or his agent and no want, failure, defect or inaccuracy of the notice shall bar compensation, unless the employer was prejudiced thereby, and then only to the extent of such prejudice.

The notice provided for in this Section shall state the name and address of the employee, the time, place, nature and cause of the injury, and shall be signed by the employee, as provided in paragraph (a) of Section 12 (§ 43-3-12 herein), or by some one in his or her behalf, and served as provided in paragraph (h) of Section 12 (§ 43-3-12 herein).

§ 43-3-14. Rules: Process and procedure to be summary and simple: Powers of board: Subpoenas: Service and fee: Fees and mileage of witnesses. The Industrial Board may make rules not inconsistent with this Act for carrying out the provisions hereof. Process and procedure under this Act shall be as summary and simple as reasonably may be. The Board or any member thereof shall have the power for the purpose of this Act to subpoena witnesses, administer or cause to have administered oaths, and to examine or cause to have examined such parts of the books and records of the parties to a proceeding as relate to questions in dispute.

Subpoenas of the Board shall be served by the marshal, or any deputy marshal, or by a person specially appointed by the marshal. The fees shall be the same as fees now provided by law for like service in civil actions. Each witness who appears in obedience to such subpoena of the Industrial Board shall receive for attendance the fees and mileage for witnesses in civil cases in the courts.

The District Court, on application of the Industrial Board or any member thereof, shall enforce, by proper

proceedings, the attendance and testimony of witnesses and the production and examination of books, papers and records.

§ 43-3-15. Procedure in disputed claims: Application for hearing: Fixing time and place of hearing: Where hearing to be held: Determination: Filing award: Copies to parties. If the employer and the injured employee, or his or her beneficiaries, disagree in regard to the compensation payable under this Act, or if they have reached such an agreement, which has been signed by him, her or them and has been filed with and approved by the Industrial Board as provided in Section 6 (§ 43-3-6 herein), and afterwards disagree as to the continuance of payments under such approved agreement, or as to the period for which payments shall be made, or as to the amount to be paid, or if a dispute arises for any other reason, either party may then make application to the Industrial Board for the determination of the matters in dispute.

Upon the filing of such application, the Board shall set the date of hearing, which shall be as early as practicable, and shall notify the parties, in the manner prescribed by the Board, of the time and place of such hearing. Such hearings shall be held in the district in which such injury occurred, unless, for the convenience of witnesses or other good cause, the Board determines that such hearing should be held elsewhere.

All disputes arising under this Act, if not settled by agreement as in this Act provided, shall be determined

by the Board; and nothing in this Section contained shall be construed to affect the continuing jurisdiction of the Board as provided in Section 4 (§ 43-3-4 herein) nor to prevent such Board from making any investigation on its own motion.

The Industrial Board, by any or all of its members, shall hear the parties, their representatives and witnesses, and shall determine the dispute in a summary manner. The award shall be filed with the record of the proceedings, and a copy thereof shall immediately be sent to each of the parties.

§ 43-3-16. Review by full Board: Application: Time for: Award: Filing: Copies. If an application for review is made to the Industrial Board within ten days from the date of an award, made by less than all the members, the full Board, if the first hearing was not held before the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith.

§ 43-3-17. Judgment on agreement or award: Effect: Modification: Costs. Any party in interest may file in the District Court for the division in which the employer resides or has his place of business, a certified copy of the memorandum of agreement approved by the Board, or of an order or decision of the Board, or of an award of the full Board unappealed from, or of an award of the full Board affirmed upon an appeal, whereupon said court shall render judgment in

accordance therewith and notify the parties. Such judgment shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though said judgment had been rendered in a suit duly heard and determined by said court.

Any such judgment of said District Court unappealed from or affirmed on appeal or modified in obedience to the mandate of the Appellate Court, shall be modified to conform to any decision of the Industrial Board, ending, diminishing or increasing any payment under the provisions of Section 4 of this Act (§ 43-3-4 herein), upon the presentation to it of a certified copy of such decision.

In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court.

§ 43-3-18. Insurance or proof of financial ability: Deposit of security. Every employer under this Act, except those exempted by Section 1 (§ 43-3-1 herein), shall either insure and keep insured his liability hereunder in some insurance company or association duly authorized to transact business of Workmen's Compensation Insurance in the Territory, or shall furnish to the Industrial Board satisfactory proof of his financial ability to pay direct the compensation provided for in this Act. In the latter case the Board may, in its discretion, require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred.

§ 43-3-19. Filing evidence of compliance: Exception: Failure to comply. Every employer under this Act, except those exempted therefrom by Section 1 (§43-3-1 herein), shall, within ten days after this Act takes effect, file with the Industrial Board, in the form prescribed by it, and thereafter within ten days after the termination of his insurance by expiration or cancellation, evidence of his compliance with the insurance provisions of Section 18 (§ 43-3-18 herein) and all others relating to insurance under this Act; provided, that this requirement shall not apply to employers who have procured from the Industrial Board certificates of their financial ability to pay compensation directly without insurance.

Any employer hereafter coming under the compensation provisions of this Act, shall, in like manner, file like evidence of such compliance.

If such employer fails, refuses, or neglects to comply with the provisions of this Section, he shall be subject to the penalties provided in Section 24 (§ 43-3-24 herein) for failure to report accidents; but nothing herein contained shall be construed as affecting the rights conferred upon injured employees or their beneficiaries under Section 10.

§ 43-3-20. Self-insurance certificates: Revocation: New certificate. Whenever an employer has complied with the provisions of Section 18 (§ 43-3-18 herein) relating to self-insurance, the Industrial Board shall issue to such employer a certificate which shall remain in force for a period fixed by the Board, but the Board may, upon at least ten days' notice and a hear-

ing, revoke the certificate of such employer upon satisfactory proof that such employer is no longer entitled thereto.

At any time after such revocation the Board may grant a new certificate to the employer, upon his petition and satisfactory proof of his financial ability as provided in Section 18 (§ 43-3-18 herein).

§ 43-3-21. Insurance policies: Approval by Insurance Commissioner: Presumption of coverage: Limitation of liability: Policy provisions.

(APPROVAL BY INSURANCE COMMISSIONER.) No insurer shall enter into or issue any policy of insurance under this Act until its policy form shall have been submitted to and approved by the Insurance Commissioner. The Insurance Commissioner shall not approve the policy form of any insurance company until such company shall file with it the certificate of the Commissioner of Insurance showing that such company is authorized to transact the business of Workmen's Compensation Insurance in the Territory. The filing of a policy form by any insurance company with the Industrial Board for approval shall constitute, on the part of such company, a conclusive and unqualified acceptance of each and all of the provisions of this Act, and an agreement by it to be bound thereby.

(PRESUMPTION OF COVERAGE.) All policies of insurance companies insuring the payment of compensation under this Act shall be conclusively presumed to cover all the employees and the entire com-

pensation liability of the insured employer employed at or in connection with the business of the employer carried on, maintained, or operated at the location or locations set forth in such policy or agreement.

(LIMITATION OF LIABILITY VOID.) Any provision in any such policy attempting to limit or modify the liability of the company issuing the same shall be wholly void except as provided in the preceding paragraph.

(REQUIRED POLICY PROVISION.) Every policy of any such company must contain the following provisions:

(a) (EXTENT OF COVERAGE.) The insurer hereby assumes in full all the obligations to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicine, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits imposed upon the insured under the provisions of the Alaska Workmen's Compensation Law.

(b) (SUBJECTION TO ACT.) That the policy is made subject to the provisions of the Alaska Workmen's Compensation Law, and the provisions of said Act relative to the liability of the insured employer to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits to and for said em-

ployees or beneficiaries, the acceptance of such liability by the insured employer, the adjustment, trial and adjudication of claims for such physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, compensation or death benefits and the liability of the insurer to pay the same are and shall be a part of this policy contract as fully and completely as if written herein.

(c) (NOTICE TO EMPLOYER.) That, as between the insurer and the employee or his or her beneficiaries, notice to or knowledge of the occurrence of the injury on the part of the insured employer shall be notice or knowledge thereof, as the case may be, on the part of the insurer; that the jurisdiction of the insured employer for the purpose of the Alaska Workmen's Compensation Act shall be the jurisdiction of the insurer, and the insurer shall, in all things, be bound by and shall be subject to the orders, awards, judgments and decrees rendered against the insured employer under said Act.

(d) (CONDITIONS OF PAYMENT.) That the insurer will promptly pay to the person or persons entitled to the same, all benefits conferred by the Alaska Workmen's Compensation Act, including physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, and all installments of compensation or death benefits that

may be awarded or agreed upon under said Act; that the obligation of the insurer shall not be affected by any default of the insured employer after the injury, or by any default in giving of any notice required by this policy; that the policy is and shall be construed to be a direct promise by the insurer to the person entitled to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, and hospital supplies, charges for burial, compensation or death benefits, and shall be enforceable in the name of such person or persons.

(e) (NOTICE OF TERMINATION.) That any termination of the policy by cancellation shall not be effective as to the employees of the insured employer covered thereby until ten days after written notice of such termination has been received by the Industrial Board. Provided, however, that if the employer has secured insurance with another insurance carrier, cancellation shall be effective as of the date of such other coverage.

(f) (JOINT LIABILITY.) That all claims for compensation, death benefits, physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, may be made directly against either the employer or the insurer, or both, and the order or award of the Industrial Board may be made against either the employer or the insurer or both.

(g) (REVOCATION BY COMMISSIONER.) That if any insurer shall fail or refuse to pay any final award or judgment (except during the pendency of an appeal) rendered against it, or its insured, or, if it shall fail or refuse to comply with any provisions of this Act, the Insurance Commissioner shall revoke the approval of the policy form, and shall not accept any further proofs of insurance from it until it shall have paid said award or judgment or complied with the violated provision of this Act, and shall have resubmitted its policy form and received the approval thereof by the Insurance Commissioner.

§ 43-3-22. Award to be final and conclusive: Questions of fact: Injunction proceedings: Certification of questions by Board: Advancement on docket: Early determination: Increase in award. An award of the Board, by less than all of the members, as provided in Section 15 (§ 43-3-15 herein), if not reviewed as provided in Section 16 (§ 43-3-16, herein), shall be final and conclusive.

An award by the full Board shall be conclusive and binding as to all questions of fact; but either party to the dispute, within thirty days from the date of such award, if such award is not in accordance with law, may bring injunction proceedings, mandatory or otherwise, against the Industrial Board, to suspend or set aside, in whole or in part, such order or award. Such proceedings shall be instituted in the United States District Court for the district in which the injury occurred. The orders, writs and processes of the court in such proceeding may run, be served, and

be returned in accordance with the rules of said Court, but the return day and hearing thereon shall not be later than sixty days after the institution of such proceedings. The payment of the amounts required by such award shall not be stayed pending final decision in any such proceeding unless, upon application for an interlocutory injunction, the court on hearing, after not less than ten days' notice to the parties and the Industrial Board, allows the stay of such payments, in whole or in part, where substantial damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such substantial damage would result to the employer, and specifying the nature of the damage.

The Board, of its own motion, may certify questions of law to said court for its decision and determination.

All such appeals and certified questions of law shall be advanced upon the docket of said court, and shall be determined at the earliest practicable date, without extensions of time for filing briefs.

Any award of the full Board affirmed on court review at the instance of the employer or his insurance carrier may be increased ten per centum by order of the court.

§ 43-3-23. Fees of attorneys and physicians: Approval: Statement of attorney's fees: Effect and payment: Report by physician. The fees of attorneys and physicians, and the charges of nurses and hospitals,

for services under this Act shall be subject to the approval of the Industrial Board. When any claimant for compensation is represented by an attorney in the prosecution of his or her claim, the Industrial Board shall fix and state in the award, if compensation be awarded, the amount of the claimant's attorney's fee. The fee so fixed shall be binding upon both the claimant and his or her attorney, and the employer shall pay to the attorney out of the award, the fee so fixed, and the receipt of the attorney therefor shall fully acquit the employer for an equal portion of the award. The Industrial Board may withhold the approval of the fees of the attending physician in any case until he shall file a report with the Industrial Board on the form prescribed by such Board.

§ 43-3-24. Records and reports of injuries: Contents of report: Violations as misdemeanor: Punishment. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within one week after occurrence and knowledge thereof, as provided in Sections 12 and 13 (§§ 43-3-12, 43-3-13 herein) of an injury to an employee causing his or her death or absence from work for more than one day, a report thereof shall be made in writing and mailed to the Industrial Board on blanks to be procured from the Board for the purpose.

The said report shall contain the name, nature and location of the business of the employer, the name, age, sex, wages, occupation of the injured employee, the date and hour of the injury and the nature and

cause thereof, and such other information as may be required by the Industrial Board.

Whoever shall fail or refuse to comply with the foregoing provisions, or whoever shall violate any of the provisions of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than Fifty Dollars nor more than Five Hundred Dollars.

§ 43-3-25. Jurisdiction of courts. No court of this Territory except the United States District Court on review, or the United States Cricuit Court of Appeals on appeal, shall have jurisdiction to review, vacate, set aside, reverse, correct, amend or annul any order or award of the Industrial Board or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Industrial Board in the performance of its duties.

§ 43-3-26. Attachment: Procedure: Affidavit: Contents: Insurance of writ without bond: Form, service, execution and return: Undertaking by defendant: Effect.

(a) (AFFIDAVIT: CONTENTS.) A writ of attachment shall be issued by the Clerk of the Court in which any action for the recovery of damages under the provisions of Section 10 (§ 43-3-10 herein) is pending, or by the United States Commissioner in any such action pending in the court of such Commissioner. Whenever the plaintiff or anyone in his behalf shall make and file an affidavit showing that he or she is entitled to recover compensation from the

defendant, under the provisions hereof, but that such defendant has failed to comply with the provisions of Sections 18 and 19 of this Act (§§ 43-3-18, 43-3-19 herein), and the certificate of the Industrial Board to that effect shall be prima facie evidence of the fact, such affidavit must show all the facts necessary to bring the plaintiff within the provisions hereof, and must further set up all the facts necessary to show that a cause of action exists in favor of the plaintiff and against the defendant for the amount sued for and for which the attachment is sought under the provisions hereof.

(b) (ISSUANCE OF WRIT WITHOUT BOND: FORM, SERVICE, EXECUTION AND RETURN.) Upon filing such affidavit in actions pending as aforesaid with the Clerk of the Court, or, the Commissioner, in actions pending in the court of such Commissioner, the plaintiff shall be entitled to have a writ of attachment issued without filing any bond or other security such writ shall be directed to the marshal and shall in all respects conform to writs of attachment in other cases and shall be issued, served, executed and returned in the same manner that writs of attachment in other cases are now issued, executed and returned.

(c) (UNDERTAKING BY DEFENDANT: EFFECT.) The defendant may, however, file a written undertaking in any pending cause for the benefit of the plaintiff in an amount equal to double the amount sued for, executed by two or more sufficient sureties, to be approved by the Judge or Commissioner in

whose court the action is pending and conditioned that the defendant will pay any judgment that may be awarded against such defendant in the action. No writ of attachment shall issue after such undertaking has been filed by the defendant, and if such undertaking shall be filed after the writ has been issued, such writ shall be quashed and if property has been attached under such writ at the time of the filing of such undertaking, such attachment shall be dissolved and set aside and the property attached and (sic) returned to the defendant.

§ 43-3-27. Physical examination: Submission to: Presence of employee's physician: Privilege: Refusal to submit to examination: Effect: Autopsy: Notice to widow or next of kin. The employee shall after an injury at reasonable times during the continuance of his or her disability, if so requested by his or her employer, or when ordered by the Industrial Board, submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the Territory or State in which such employee may be found, furnished and paid for by the employer, or by the Board. The employee shall have the right to have a physician, provided and paid for by himself or herself, present at such examination or examinations. No fact communicated to, or otherwise learned by any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in the hearings providd for in this Act, or any action to recover damages against any em-

ployer who is subject to the compensation provisions of this Act. If any employee refused to submit himself or herself to any such examination or examinations provided for herein, his or her rights to compensation shall be suspended until such obstruction or refusal ceases, and his or her compensation, during such period of suspension, may, in the discretion of the Industrial Board, or the court determining an action brought for the recovery of damages hereunder, be forfeited.

The employer, or the Industrial Board, shall have the right in any case of death to require an autopsy at the expense of the party requesting same.

No autopsy shall be held in any case without notice first being given to the widow or next of kin, if they reside in the Territory, or their whereabouts can reasonably be ascertained, of the time and place thereof and reasonable time and opportunity given such widow or next of kin to have a representative present to witness the autopsy shall be suppressed on motion duly made to the Industrial Board, or to the Court, as the case may be.

§ 43-3-28. Waiver or exemption from statute forbidden. No agreement by an employee to waive his or her rights to compensation under this Act shall be valid, except as herein elsewhere provided, and no employer or employee shall exempt himself, herself or itself, except in the manner herein elsewhere provided, from the burden or waive the benefits of this Act, by any contract, agreement, rule, regulation or

device, and any such contract, agreement, rule, regulation or device shall be absolutely void.

§ 43-3-29. Claims barred if not filed within two years. Any and all claims for compensation hereunder shall be barred unless a claim for compensation shall be filed with the Industrial Board within two years after the injury, or, if death results therefrom, within two years after such death, after the injury was sustained, or, in the event of mental incapacity, within two years after the removal of such mental incapacity.

§43-3-30. Liability of third persons: Proceedings by employer: Subrogation to employee. Where the injury for which compensation is payable hereunder was caused under circumstances creating a legal liability in someone other than the employer to pay damages in respect thereof, the employee may take proceedings against the one so liable to pay damages and against any one liable to pay compensation under this Act, but shall not be entitled to receive both damages and compensation. And if the employee has been paid compensation under this Act, the employer by whom the compensation was paid shall be entitled to indemnity from the person, firm or corporation so liable to pay damages as aforesaid and to the extent of such indemnity shall be subrogated to the rights of the employee to recover damages therefor.

§ 43-3-31. Report of termination of compensation. Every employer paying compensation directly without insurance, and every insurance carrier paying compensation in behalf of an employer, shall, within ten

days from the termination of the compensation period fixed in any award against him or its insured, for an injury or death, either by the approval of an agreement or upon hearing, and within ten days from the full redemption of any such approved agreement or award, by the cash payment thereof in a lump sum or otherwise, as in this Act or by the order or award of the Industrial Board provided, shall make such report or reports as the Industrial Board may require.

§ 43-3-32. Failure to secure payment: Common law defenses abolished: Presumptions. If such employer fails to provide security as required by Sections 18 and 19 (§§ 43-3-18, 43-3-19 herein), such employer shall not escape liability for personal injury sustained by an employee of such employer when the injury sustained arises out of and in the usual course of the employment because:

(1) The employee assumed the risks inherent to or incidental to or arising out of his or her employment or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of an employer to furnish reasonably safe tools or appliances, or because the employer exercises reasonable care in selecting reasonably competent employees in the business;

(2) That the injury was caused by the negligence of a co-employee.

(3) That the employee was negligent, unless and except it shall appear that such negligence was wilful

and with intent to cause the injury, or was the result of wilful intoxication on the part of the injured party;

(4) In such actions by an employee against an employer for personal injury sustained arising out of and in the course of the employment where the employer has failed to provide the security as required by Sections 18 and 19 (§§ 43-3-18, 43-3-19 herein), it shall be presumed that the injury to the employee was the first result growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such case the burden of proof shall rest upon the employer to rebut the presumption of negligence.

§ 43-3-33. Presumption of direct payment: Notice: Posting: Places of posting: Form of notice. Every such employer shall be conclusively presumed to have elected to pay compensation directly to employees for injuries sustained arising out of and in the course of the employ- according to the provisions hereof, unless and until notice in writing of insurance, stating the name and address of the insurance company and the period of insurance, shall have been given to the employee. Such notice shall be posted and kept on the premises of the employer or on the premises where the employer's operations are being carried on in three conspicuous places; one of which shall be at the office of the employer; one at the mess house or boarding house, if there be one, and the third in some conspicuous place on the premises or works. Such recorded and posted notice shall be substantially in the

following form, and the signature shall be witnessed by two witnesses:

EMPLOYER'S NOTICE OF INSURANCE

To the employees of the undersigned:

You and each of you are hereby notified that the undersigned is insured in the.....Insurance Company, whose address is.....and that the period covered by such insurance is.....in accordance with the terms, conditions and provisions to pay compensation to employees of the undersigned for injuries received as provided in the Act of the Territory of ~~Alaska, known~~ as the "Workmen's Compensation Act of the Territory of Alaska."

(Signed).....

.....

Witnesses:

.....

§ 43-3-34. Article to be part of every contract of hire: Construction. This article shall constitute part of every contract of hire, express or implied, and the same shall be construed as an agreement on the part of the employer to pay and on the part of the employee to accept compensation in the manner hereby provided for all personal injuries sustained, arising out of and in the course of employment.

§ 43-3-35. When excluded employee presumed to accept compensation under this Act: Voluntary Insurance. All employees excluded by the provisions of Section 1 of this Act (§ 43-3-1 herein) shall be conclusively presumed to have elected to take compensa-

tion in accordance with the provisions of Section 33 (§ 43-3-33 herein) in the following cases.

(a) In the event that any employer who employs a person or persons in domestic service, or who is engaged in agriculture, dairying, or the operation of railroads as common carriers, and is, therefore, by reason of the provisions of Section 1 (§ 43-3-1 herein) excluded from the terms, conditions and provisions hereof, voluntarily obtains insurance for the protection of his or its employees for injuries arising out of and in the course of the employment, the rights and remedies hereof shall apply where an employee brings an action or takes proceedings to recover damages or compensation for injuries received growing out of and in the course of his or her employment, and such employee shall be and remain subject to the provisions hereof the same as if such employment had not been excluded by the provisions of Section 1 of this Act (§ 43-3-1 herein).

§ 43-3-36. Alaska Industrial Board created: Members: Chairman: Powers. A Board is hereby created which shall be known as the "Alaska Industrial Board," to be composed of the following three members: The Territorial Insurance Commissioner, the Attorney General and the Territorial Commissioner of Labor. The Commissioner of Labor shall be Chairman of the Alaska Industrial Board, and shall be the executive officer of the Board, and shall be empowered to perform all acts necessary to carry into effect all provisions of this Act.

§ 43-3-37. Assignment of claim: Waiver of exemption. No claim for compensation, or compensation agreed upon, awarded, adjudged, or paid, shall be assignable, or subject to levy, execution, attachment, garnishment, or any other remedy or procedure for the recovery or collection of a debt, and this exemption cannot be waived.

§ 43-3-38. Definition of terms. Wherever the term "employer" is used in this Act, reference is had to the Territory or any of its political subdivisions and to any person or persons, partnership, joint stock company, association or corporation employing three or more persons in connection with any business or industry coming within the scope hereof and carried on in this Territory, and whenever the term "employee" is used herein, reference is had to an employee employed by an employer as above defined.

If the employer is insured, the term "employer" shall include the insurer so far as applicable.

The term "beneficiary" as used herein refers to any person entitled to compensation under the provisions hereof.

The masculine gender, whenever used herein, shall be held to include the feminine and neuter.

For the purpose of this Act, "child" or "children" shall mean a child or children under the age of eighteen years depending upon the injured employee for support.

"Widower" shall include one who is divorced and is not required by decree of divorce to contribute to the support of his former wife.

"Married" shall include one who is divorced but is required by the decree of divorce to contribute to the support of his former wife.

The term "injury" or "personal injury" means an injury by accident arising out of and in the course of employment, including any disease proximately caused by the employment, which is due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation, process or employment, and to exclude all ordinary diseases of life to which the general public are exposed; including, also, any injury caused by the wilful act of a third person directed against the employees because of his or her employment, but shall not include injuries caused by the employee's wilful intention to injure himself or herself or to injure another or caused by his or her wilful intoxication.

§ 43-3-39. **Title of Act.** This Act shall be cited as "The Workmen's Compensation Act of Alaska."

§ 43-3-40. **Separability of Provisions.** If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

§ 43-3-41. **Laws Repealed.** This Act shall supersede and repeal all other laws of the Territory relat-

ing to Workmen's Compensation, and Section 2161 to Section 2203, inclusive, Compiled Laws of Alaska 1933,* as amended by Chapter 84, Session Laws of Alaska 1935, Chapter 74, Session Laws of Alaska 1937, Chapter 49, Session Laws of Alaska 1939, Chapter 41, Session Laws of Alaska 1941, and Chapter 63, Session Laws of Alaska 1937, are hereby specifically repealed."

*Formerly Chapter 25, Session Laws of Alaska 1929.